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Childbearing Under Unbearable Circumstances: The Importance of Abortion Ban Exceptions for Victims of Sexual Violence and the Current Bias Against Sex Trafficking Victims

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CHILDBEARING UNDER UNBEARABLE CIRCUMSTANCES: THE IMPORTANCE OF ABORTION BAN EXCEPTIONS FOR VICTIMS OF SEXUAL VIOLENCE AND THE CURRENT BIAS AGAINST SEX TRAFFICKING VICTIMS

Lori N. Ross*

I. INTRODUCTION

On June 24, 2022, the United States Supreme Court drastically changed the course of abortion law in America and eliminated the federal constitutional right to abortion established in the Court's 1973 *Roe v. Wade* decision[1]. In *Dobbs v. Jackson Women's Health Organization*,[2] the Court overruled *Roe*, reasoning that "procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history . . . [and thus] States may regulate abortion for legitimate reasons."[3] A draft of the majority opinion, written by Justice Alito, was released in May 2022, exposing the Court's "unflinching repudiation of the 1973 decision which guaranteed federal constitutional protections of abortion rights and a subsequent 1992 decision—*Planned Parenthood v. Casey*[4]—that largely maintained the right."[5] As expected, when the Court issued the *Dobbs* opinion almost two months later, it struck down *Roe* and held that a Mississippi abortion ban, prohibiting abortion after fifteen weeks of pregnancy, was constitutional.[6] The Mississippi ban did not allow for abortion exceptions in cases of rape and incest and only allowed an exception "in a medical emergency or in the case of a severe fetal abnormality."[7]

Shortly after the Supreme Court issued its decision in *Dobbs*, President Biden signed the first of two executive orders designed to

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1. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
2. *Dobbs*, 142 S. Ct. 2228.
3. *Id.* at 2283.
4. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.
5. Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO, https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/FP6G-W62L] (May 3, 2022, 2:14 PM).
6. *Dobbs*, 142 S. Ct. at 2284.
7. MISS. CODE ANN. § 41-41-191(4)(b) (West 2022).

protect individuals' rights and access to reproductive health care.[8] The first executive order, entitled Protecting Access to Reproductive Health Care Services, was issued on July 8, 2022, and the second order entitled "Securing Access To Reproductive And Other Healthcare Services," was issued roughly a month later on August 3, 2022.[9] The second executive order was created to assist with individuals traveling from one state to another for abortion services and to ensure that medical providers complied with federal law in providing those abortion services "without delay."[10]

In terms of federal legislative initiatives following *Dobbs*, the United States House of Representatives passed two bills also designed to protect abortion accessibility on a federal level,[11] H.R. 8296, the Women's Health Protection Act of 2022, and H.R. 8297, the Ensuring Access to Abortion Act of 2022.[12] Those bills, sponsored by Democrat representatives, have been unsuccessful in the Senate thus far and are unlikely to pass due to the lack of needed votes from Republican legislators.[13]

On the state level, within a little over a month after *Dobbs*, twenty-three states had passed or were on the verge of passing strict abortion laws,[14] with approximately two-thirds of those states not providing rape or incest exceptions.[15] Two states not affording exceptions to

8. *Fact Sheet: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services*, THE WHITE HOUSE (July 8, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/08/fact-sheet-president-biden-to-sign-executive-order-protecting-access-to-reproductive-health-care-services/ [https://perma.cc/52AU-V95G].

9. *Id.*; *Fact Sheet: President Biden Issues Executive Order at the First Meeting of the Task Force on Reproductive Healthcare Access*, THE WHITE HOUSE (Aug. 3, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/03/fact-sheet-president-biden-issues-executive-order-at-the-first-meeting-of-the-task-force-on-reproductive-healthcare-access-2/ [https://perma.cc/YX52-RXJQ].

10. *Fact Sheet: President Biden Issues Executive Order at the First Meeting of the Task Force on Reproductive Healthcare Access*, *supra* note 9.

11. Clare Foran & Kristin Wilson, *House Passes Bills to Protect Abortion Access After* Roe v. Wade *Overturned*, CNN, https://www.cnn.com/2022/07/15/politics/house-abortion-access-legislation-vote [https://perma.cc/F827-V22J] (July 15, 2022, 2:10 PM).

12. *Id.*

13. *See id.*

14. Louis Jacobson, *Many States Are Looking Toward Abortion Bans with No Exceptions for Rape, Incest*, POLITIFACT (July 18, 2022), https://www.politifact.com/article/2022/jul/18/next-frontier-battle-over-abortion-bans-carve-outs/ [https://perma.cc/Y8JS-NDLY].

15. *Id.* States were included in the report if "they passed a 'trigger law' that was pegged to the overturning of *Roe v. Wade*, if they [were] seeking to re-impose a pre-1973 law

sexual violence victims are Florida and Texas.[16] This article takes a closer look at the abortion legislation in those states, which represents some of the most restrictive abortion laws in the country, with Texas imposing a total ban on abortion and Florida imposing a ban on abortions after the fifteenth week of gestation.[17] Additionally, this article discusses abortion law in Indiana, which was the first state in the nation to pass abortion legislation after the *Dobbs* decision.[18] Although several states currently have in place abortion laws excluding exceptions for rape and incest, polls conducted after *Dobbs* reflect that the majority of Americans believe abortion exceptions should be allowed if an individual becomes pregnant as a result of rape or incest circumstances.[19]

Following this overview of the current status of states' abortion laws in the country, focusing on those states excluding exceptions for sexual violence victims, this article proceeds with a discussion

banning abortion, if they [were] trying to lift court blockages of *Roe*-era restrictive laws, or if they [were] actively pursuing an abortion ban . . . in the legislature." *Id.*

16. *See* Maya Yang, *Slew of Trigger Laws Kick in as Three More US States Ban Abortions*, THE GUARDIAN (Aug. 25, 2022, 1:14 PM), https://www.theguardian.com/us-news/2022/aug/25/us-abortion-trigger-bans-laws-tennessee-texas-idaho [https://perma.cc/7GDX-H7MS] ("Texas, which already passed one of the nation's strictest abortion laws last yearbanning [sic] the procedure beyond six weeks of pregnancy and offering no exceptions for incest or rape [Senate Bill 8], will see a new trigger law take effect that makes the provision of abortion a first-degree felony. Consequences include life sentences and a civil penalty of $100,000 for each violation."); *see also* Michelle Boorstein, *Clerics Sue Over Florida Abortion Law, Saying it Violates Religious Freedoms*, WASH. POST, https://www.washingtonpost.com/dc-md-va/2022/08/01/florida-abortion-law-religion-desantis/ [https://perma.cc/W9R5-8YT3] (Aug. 2, 2022, 1:50 PM) (noting that Florida's abortion ban is one of the strictest antiabortion measures in the country).

17. Jacobson, *supra* note 14; *see infra* Part III; *see also* Steve Contorno, *DeSantis Signs Florida's 15-Week Abortion Ban into Law*, CNN, https://www.cnn.com/2022/04/14/politics/desantis-signs-abortion-ban-florida/index.html [https://perma.cc/PU8U-EBJ6] (Apr. 14, 2022, 1:26 PM) (noting that Florida's ban is similar to the Mississippi ban upheld as constitutional by the Supreme Court);.

18. Wynne Davis, *Large Employers Express Opposition After Indiana Approves Abortion Ban*, NPR, https://www.npr.org/2022/08/06/1116132623/indiana-becomes-1st-state-to-approve-abortion-ban-post-roe [https://perma.cc/PA9N-DXGN] (Aug. 6, 2022, 6:06 PM); Associated Press, *Indiana Legislature First to Approve Abortion Bans Post* Roe, POLITICO, https://www.politico.com/news/2022/08/05/indiana-legislature-first-to-approve-abortion-bans-post-roe-00050199 [https://perma.cc/A9FJ-DLHG] (Aug. 5, 2022, 11:41 PM); *see infra* Part III.

19. Christine Filer, *With Supreme Court Poised to Reverse* Roe*, Most Americans Support Abortion Rights: Poll*, ABC NEWS (May 3, 2022, 12:00 PM), https://abcnews.go.com/Politics/supreme-court-poised-reverse-roe-americans-support-abortion/story?id=84468131 [https://perma.cc/79A6-LRLD]; *see infra* Part IV.

regarding the nexus between abortion and sexual violence. I examine the intersection of abortion with rape, incest, and sex trafficking, respectively, and argue that all states should allow these abortion exceptions because of the severe psychological and physical harms that sexual violence survivors will experience as a result of being forced to continue a pregnancy resulting from sexual abuse.[20] Affording these exceptions will support victims' recovery and help prevent further victimization.[21] Moreover, I contend that states currently allowing rape and incest exceptions should consider the "requirement" hurdles that sexual violence victims are mandated to overcome to qualify for an exception, which are often so onerous that they can lead to secondary trauma and function as obstacles to accessing abortion healthcare.[22]

Finally, this article analyzes possible reasons why sex trafficking victims are not typically included with rape and incest victims in states' abortion exceptions, noting that only a small number of states have even debated allowing abortion exceptions for sex trafficking victims in their legislation.[23] I posit that the lack of clearly established abortion exceptions for sex trafficking victims is possibly reflective of an ideology of some that fails to view sex trafficking victims as "victims" and associates them more with prostitution, which has been defined as a "*voluntary* act of engaging in sex work

20. *See* Jennifer Haberkorn, *Rape Exceptions to Abortion Bans Were Once Widely Accepted. No More*, L.A. TIMES (Apr. 8, 2022, 3:00 AM), https://www.latimes.com/politics/story/2022-04-08/red-states-eliminate-rape-exceptions-from-abortion-bans?_amp=true [https://perma.cc/TYW6-Y6DR]; *see also infra* Parts V–VI.

21. Amanda Ann Gregory, *How Overturning* Roe vs. Wade *Threatens Trauma Survivors*, PSYCH. TODAY (June 24, 2022), https://www.psychologytoday.com/us/blog/simplifying-complex-trauma/202206/how-overturning-roe-vs-wade-threatens-trauma-survivors [https://perma.cc/7UXN-6XWV]; *see infra* Part IX.

22. Elizabeth Chuck, *Post*-Roe*, Exceptions to State Abortion Bans Won't Be Easy to Acquire*, NBC NEWS (June 24, 2022, 1:24 PM), https://www.nbcnews.com/news/us-news/post-roe-exceptions-state-abortion-bans-wont-easy-acquire-rcna34986 [https://perma.cc/JZ7P-Z5KN]; *see infra* Part VII.

23. *See Abortion Ruling Prompts Variety of Reactions from States*, THE ASSOCIATED PRESS (Aug. 25, 2022), https://apnews.com/article/2022-midterm-elections-abortion-health-sexual-abuse-by-clergy-constitutions-022d340cf968be3c28b03f7f96965f09 [https://perma.cc/8TQG-A5G5] (discussing different states legislatures' actions since the *Dobbs* decision); *see also* Contorno, *supra* note 17; Alex Ebert, *Rape Exception Divides Indian Republicans in Abortion Debate*, BLOOMBERG L. (July 29, 2022, 4:33 PM), https://news.bloomberglaw.com/us-law-week/rape-exception-divides-indiana-republicans-in-abortion-debate [https://perma.cc/XR7Z-NX99]; Bobby Allyn, *Missouri Governor Signs Ban on Abortion After 8 Weeks of Pregnancy*, NPR (May 24, 2019, 12:26 PM), https://www.npr.org/2019/05/24/724532856/missouri-governor-signs-ban-on-abortion-after-8-weeks-of-pregnancy [https://perma.cc/3YZG-BLHP]; *see also infra* Part VIII.

performance for monetary compensation."[24] This misperception of trafficking victims as willing participants may be one reason why many states have not specifically identified sex trafficking victims as part of their abortion ban exceptions, which has caused confusion as to whether states' abortion exceptions apply to trafficking victims.[25] Accordingly, in order to eliminate the ambiguity that currently exists regarding the applicability of abortion exceptions to trafficking victims, it is crucial that states providing exceptions: (1) clearly state their intention to include trafficking victims as individuals "covered" under existing rape exceptions, or (2) specifically prescribe in the legislation sex trafficking as an abortion exception basis.

II. SEMINAL UNITED STATES SUPREME COURT PRECEDENT ON ABORTION

Nearly fifty years ago, the United States Supreme Court's landmark decision in *Roe v. Wade* established the constitutional right to an abortion.[26] Following *Roe*, the Court reaffirmed the rights established in *Roe,* and concluded that "'the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.' Central to that conclusion was a full-throated restatement of a woman's right to choose . . . grounded . . . in the Fourteenth Amendment's guarantee of 'liberty.'"[27] That constitutional right has now been revoked with the overturning of *Roe* by the Court's recent decision in *Dobbs.*[28] A review of *Roe* and *Dobbs* is integral, therefore, to understanding the history of abortion law in our country for the past forty-nine years and the current state of abortion law which allows states to heavily restrict or outright ban abortions in their respective jurisdictions.

24. Faith L. Browder, Public Perceptions on Domestic Sex Trafficking and Domestic Sex Trafficking Victims: A Quantitative Analysis (Dec. 2018) (emphasis added) (M.A. thesis, East Tennessee State University) (on file with Digital Commons at East Tennessee State University), https://dc.etsu.edu/cgi/viewcontent.cgi?article=4946&context=etd [https://perma.cc/C4PA-XHAF]; *see infra* Part VIII.

25. Patricia Murphy, *Opinion: The Many Unknowns of Georgia's New Abortion Law*, THE ATLANTA J.-CONST. (July 22, 2022), https://www.ajc.com/politics/opinion-the-many-unknowns-of-georgias-new-abortion-law/UHZG3RT5ANF7XDHZN5TNNRCJDA [https://perma.cc/V6PJ-6J6D]; *see infra* Part IX.

26. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

27. *Dobbs*, 142 S. Ct. at 2321 (Breyer, Sotomayor & Kagan, JJ., dissenting) (discussing the *Casey* opinion).

28. *See id.* at 2334.

A. Roe v. Wade

In March 1970, Jane Roe filed an action against the District Attorney of Dallas County, Texas, seeking a declaratory judgment regarding the constitutionality of Texas criminal abortion statutes.[29] Roe sought the court to declare that the statutes were unconstitutional on their face and asked the court to grant injunctive relief preventing the district attorney from enforcing the abortion statutes.[30] In her complaint,

> Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion 'performed by a competent, licensed physician, under safe, clinical conditions'; that she was unable to get a 'legal' abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint Roe purported to sue 'on behalf of herself and all other women' similarly situated.[31]

A licensed physician, James Hubert Hallford, intervened in the lower court action and alleged in his complaint that he had been arrested on prior occasions for violating the Texas abortion statutes and was facing prosecution for these violations.[32] Hallford further averred that patients would come to him for abortion services, and that in many of these cases, even as the physician, he was not able to determine if the abortion would have fallen "within or outside the exception recognized by Article 1196" and, thus, the statutes "were vague and uncertain, in violation of the Fourteenth Amendment, . . . violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine . . . ." Hallford alleged that these rights were "guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments."[33]

29. *Roe*, 410 U.S. at 120.
30. *Id.*
31. *Id.*
32. *Id.* at 120–21.
33. *Id.* at 121.

A companion complaint was also filed by John and Mary Doe.[34] Like Roe, the married couple filed their action against the district attorney seeking a declaratory judgment and injunction, alleging that their constitutional rights had been violated.[35] The allegations of the Does' complaint indicated that they did not have any children and that Mrs. Doe's physician had advised her not to get pregnant until her neural-chemical disorder "materially improved (although a pregnancy at the present time would not present 'a serious risk' to her life)."[36] Additionally, they alleged that Mrs. Doe had stopped using birth control pills pursuant to medical advice she had received, and that, if she became pregnant, she "would want to terminate the pregnancy" by a physician.[37] In an amended complaint, the Does alleged that they were suing on their behalf and "all couples similarly situated."[38]

Roe's action, in which Dr. Hallford had intervened, and the Does' action were consolidated and heard together.[39] The district court held that Roe and members of her class, along with Dr. Hallford, had proper standing to sue and presented justiciable controversies.[40] However, the Does did not have standing to sue and did not allege sufficient facts to establish a present controversy.[41] Accordingly, the district court held that:

> [T]he 'fundamental right of single women and married persons to choose where to have children is protected by the Ninth Amendment, through the Fourteenth Amendment,' and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction . . . [and] dismissed the Does' complaint, declared the abortion statutes void, and dismissed the application for injunctive relief.[42]

34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 122.
41. *Id.*
42. *Id.* (citing Roe v. Wade, 314 F. Supp. 1217, 1225 (N.D. Tex. 1970)).

Roe, Doe, and intervenor, Dr. Hallford, all appealed to the United States Supreme Court based on the district court's denial of injunctive relief.[43] Additionally, the district attorney cross-appealed challenging the district court's decision to grant declaratory relief to Roe and Dr. Hallford.[44] However, the Court dismissed Dr. Hallford's intervention action due to lack of standing and upheld the lower court's decision to dismiss the Doe's complaint because they failed to present an actual case or controversy.[45]

The Court proceeded in the opinion by addressing Roe's challenge to the abortion statutes alleging an improper invasion of a constitutional right to terminate her pregnancy rooted in the "concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras . . . or among those rights reserved to the people by the Ninth Amendment."[46]

Before addressing the constitutionality of the statutes, the Court provided a historical survey of abortion, as well as discussed the purposes and interests fostering states' criminal abortion laws.[47] Within this discussion, the Court addressed "ancient attitudes"; "[t]he Hippocratic Oath"; "[t]he common law"; "[t]he English statutory

43. *Id.*

44. *Id.*

45. *Id.* at 126–27. Reasoning that Dr. Hallford made "no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions[,]" the Court reversed the lower court's grant of declaratory relief and dismissed his intervention action. *Id.* As to the Does, the Court explained that

> [A]s their asserted immediate and present injury, [they] only [allege] 'detrimental effect upon (their) marital happiness' because they are forced to 'the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy.' Their claim is that sometime in the future Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and at that time in the future she might want an abortion that might then be illegal under the Texas statutes . . . . [The Court concluded] that the bare allegation of so indirect an injury is [in]sufficient to present an actual case or controversy.

Id. at 128.

46. *Id.* at 129.

47. *See id.* 129–47.

law"; and "[t]he American law."[48] In its analysis regarding American law, the Court concluded that

> [A]t common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century.[49]

The Court also addressed the American Medical Association's position, noting that the association shared "[t]he anti-abortion mood prevalent in this country in the late 19th century[,]" which may have contributed greatly to strict criminal abortion laws being enacted during that time.[50] In addition to explaining the AMA's position, the Court also assessed the positions of the American Public Health Association and American Bar Association at that time.[51]

Acknowledging that the Constitution does not explicitly mention a right to privacy, the Court noted that it has "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy" has existed under the Constitution since the late 1800s.[52] Citing numerous precedent cases, the Court continued by stating that it, or specific Justices, considering a variety of circumstances, has found the "roots" of the right of personal privacy in the First, Fourth, Fifth, and Ninth Amendments, as well as the penumbras of the Bill of Rights, and in "the concept of liberty guaranteed by the first section of the Fourteenth Amendment[.]"[53] It further explained that the Court's prior decisions have established that this personal privacy guarantee can only be based on rights that are "fundamental" or "implicit in the concept of ordered liberty" and has been extended "to activities relating to marriage, procreation, contraception, family

48. *Id.* at 130–38.
49. *Id.* at 140–41.
50. *Id.* at 141.
51. *Id.* at 144–46.
52. *Id.* at 152.
53. *Id.*

relationships, and child rearing and education."[54] The Court continued:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by childcare. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.[55]

Noting its disagreement with Roe and other amici that "the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she" deems, the Court concluded that "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."[56] The Court stated that Roe's argument that Texas did not have a valid interest in regulating the abortion decision or failed to have an interest strong enough to substantiate any restrictions on a woman's decision was unconvincing.[57] It further reasoned that the woman's privacy right cannot be deemed absolute because at some stage during pregnancy a State's interests "become sufficiently compelling to sustain

54. *Id.* at 152–53 (citations omitted).
55. *Id.* at 153.
56. *Id.* at 154.
57. *Id.* at 153.

regulation of the factors that govern the abortion decision."[58] The court indicated that regulation restricting fundamental rights is only warranted when there is a compelling state interest and such regulation "must be narrowly drawn to express only the legitimate state interests at stake."[59]

In response to the Appellee's argument that the fetus is a "'person' within the language and meaning of the Fourteenth Amendment[,]"[60] the Court concluded that the term "person" as referenced in that amendment, "does not include the unborn."[61] The Court further stated that outside of criminal abortion, the law has been hesitant to advance "any theory that life . . . begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth."[62] Based on this, the Court found that "by adopting one theory of life, Texas may [not] override the rights of the pregnant woman that are at stake."[63] In reaching this conclusion, however, the Court reiterated that the State has "an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and that it has still another important and legitimate interest in protecting the potentiality of human life."[64] The court acknowledged that these are independent interests, each becoming more substantial as a pregnant woman nears term "and, at a point during pregnancy, each becomes 'compelling.'"[65]

Accordingly, the Court summarized its holding as follows:

> 1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

58. *Id.* at 154. The Court further noted its disagreement with some amici, which had asserted "that one has an unlimited right to do with one's body as one pleases," and indicated that the Court "has refused to recognize an unlimited right of this kind in the past." *Id.*
59. *Id.* at 155. The Court also noted that "recent abortion cases" in lower federal courts had likewise "recognized these principles." *Id.* at 156.
60. *Id.* at 157.
61. *Id.* at 158.
62. *Id.* at 161.
63. *Id.* at 162.
64. *Id.*
65. *Id.* at 162–63.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
(c) For the stage subsequent to viability, [the point at which the 'fetus then presumably has the capability of meaningful life outside the mother's womb'][66] the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

2. The State may define the term 'physician,' . . . to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.[67]

66. *Id.* at 163.

67. *Id.* at 164–65. The Court also referenced *Doe v. Bolton*, noting that the opinion considered some "procedural requirements" embodied in one of the present-day abortion statutes, and that *Doe* and *Roe* "are to be read together." *Id.* at 165 (citing Doe v. Bolton, 410 U.S. 179 (1973)). In his concurring opinion, Justice Stewart stated:

> The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights . . . .
>
> . . . .
>
> Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.
>
> It is evident that the Texas abortion statute infringes that right directly.

Id. at 167–69 (Stewart, J., concurring).

Justice Rehnquist and Justice White wrote separate dissenting opinions, which "emphasized that the people and the legislatures, not the Court, should weigh this matter."[68] Justice White argued "[that the majority's] judgment [was] an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court."[69]

Justice Rehnquist took issue with the Court's conclusion that "[a] right of 'privacy' [was] involved in [the] case."[70] Justice Rehnquist stated:

> I agree with the statement of Mr. Justice Stewart in his concurring opinion that the 'liberty,' against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective . . . . But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.[71]

Justice Rehnquist reasoned that utilizing a standard requiring a "compelling state interest" in cases applying substantive due process standards to social and economic welfare regulations would necessitate that the Court assess "the legislative policies and pass on the wisdom of these policies" while determining if a specified state interest rises to a compelling level or fails to meet the standard.[72]

Justice Rehnquist further noted that the Court was engaging more in "judicial legislation" rather than deciphering the drafters' intent of the Fourteenth Amendment when it decided to separate pregnancy

68. Roe v. Wade (1973), CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/roe_v._wade_(1973) [https://perma.cc/BJ8M-KRZL] (last visited Dec. 18, 2022).
69. Roe v. Wade, 410 U.S. 113, 222 (1973) (White, J., dissenting).
70. *See id.* at 171–72 (Rehnquist, J., dissenting).
71. *Id.* at 172–73.
72. *Id.* at 174.

into three terms and specify the type of regulation that would be permissible within those terms.[73]

Finally, Justice Rehnquist concluded his dissent by noting that the fact that most of the states at the time of the opinion had laws restricting abortion extending back for at least 100 years was a "strong indication" that the "asserted right to an abortion [was] not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[74] He indicated that the validity of the Texas statute (which had not substantially changed at the time of the Court's *Roe* decision) was not questioned when the Fourteenth Amendment was adopted.[75] Per Justice Rehnquist, "[t]here apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted."[76] Accordingly, he concluded that, based on this history, it was not the drafters' intent for the Fourteenth Amendment to remove States' authority to legislate abortion matters.[77]

B. Dobbs v. Jackson Women's Health Organization

1. The Majority Opinion

Justice Samuel Alito penned the majority opinion with four other justices joining, including Justice Thomas, Justice Gorsuch, Justice Kavanaugh, and Justice Barrett.[78] Justice Thomas and Justice Kavanaugh filed concurring opinions, and Chief Justice Roberts filed an opinion concurring in the judgment.[79]

At the lower level, respondents, Jackson Women's Health Organization, an abortion clinic, and one of the clinic's doctors, filed an action in federal district court "against various Mississippi officials" asserting that the Gestational Age Act violated the Supreme Court's prior holdings that a woman has a constitutional right to

73. *Id.*
74. *Id.*
75. *See id.* at 176–77.
76. *Id.* at 177.
77. *Id.* Justice Rehnquist ended the dissent by stating that even if he were to agree with the Court's decision, the Court's disposition of the case was improper in that it struck down the statute as unconstitutional "in toto" even though it acknowledged that Texas could impose statutory restrictions on abortion during later stages of pregnancy. *Id.* Justice Rehnquist reasoned that "a statute found to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply 'struck down' but is, instead, declared unconstitutional as applied to the fact situation before the Court." *Id.* at 178.
78. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2239 (2022).
79. *Id.*

abortion.[80] The suit was filed on the day Mississippi's law was enacted.[81] The Mississippi statute at issue stated in pertinent part:

> Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.[82]

The respondents were successful with their suit at the lower level, as the district court granted summary judgment on their behalf and enjoined enforcement of the Act.[83] The district court reasoned that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[84] Since the Act's fifteen-week gestational period is before the point of viability, the court held that the Act was unconstitutional.[85]

On appeal, the Fifth Circuit affirmed the lower court's decision.[86] The Supreme Court granted certiorari review to resolve the issue of whether "all pre-viability prohibitions on elective abortions are unconstitutional."[87] The main argument asserted by the petitioners in defense of the Act was that the Court erred in its decisions in *Roe* and *Casey*, and that, because the Act meets a rational-basis review, it is constitutional.[88] Conversely, the respondents argued that allowing the state to ban "pre-viability" abortions would essentially be the same as overruling the *Casey* and *Roe* decisions in their entirety.[89]

In determining the issue of whether the Constitution confers a right to obtain an abortion, the Court addressed the question in three parts.[90] The Court first addressed the standard established in its precedent for determining if "liberty," as referenced in the Fourteenth

80. *Id.* at 2244.
81. *Id.*
82. MISS. CODE ANN. § 41-41-191 (West 2022).
83. *Dobbs*, 142 S. Ct. at 2244.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

Amendment, protects any specific rights.[91] Next, the Court assessed whether the abortion right is "rooted in our Nation's history and tradition and whether it is an essential component of what we have described as 'ordered liberty.'"[92] Last, the Court examined if the right to obtain an abortion falls under a greater "entrenched right" substantiated by other case precedents.[93]

The Court proceeded by noting that the inception of constitutional analysis begins with an examination of the text of the Constitution which provides "a 'fixed standard' for ascertaining what [the] founding document means," and that since the Constitution does not expressly mention a right to obtain an abortion, one must demonstrate that such a right is implicitly referenced in the text.[94] The Court further asserted that *Roe* "was remarkably loose in its treatment of the constitutional text" by holding that an abortion right was part of a privacy right stemming from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, when neither an abortion right nor privacy right is mentioned in the Constitution.[95]

The Court further stated that, although the *Roe* decision

> expressed the "feel[ing]" that the Fourteenth Amendment was the provision that did the work, . . . its message seemed to be that the abortion right could be found *somewhere* in the Constitution and that specifying its exact location was not of paramount importance. The *Casey* Court did not defend this unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the "liberty" protected by the Fourteenth Amendment's Due Process Clause.[96]

Hence, the Court then examined *Casey*'s position that the liberties guaranteed by the Fourteenth Amendment's Due Process Clause encompass the right to an abortion.[97] The Court acknowledged that the Due Process Clause protects substantive rights that embody "fundamental rights" not referenced in the Constitution.[98] However, the Court found that to determine if a right can be protected as a fundamental right, the Court "has long asked whether the right is

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 2244–45.
95. *Id.* at 2245.
96. *Id.*
97. *Id.* at 2246.
98. *Id.*

'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[99] The Court concluded that "[w]hen we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion."[100]

To support its conclusion, the Court then engaged in a historical analysis.[101] Before delving into a detailed analysis, the Court summarized its findings as follows:

> Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*.
>
> Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a *crime* in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.
>
> *Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis . . . .
>
> . . . .
>
> The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion

99. *Id.*
100. *Id.* at 2248.
101. *See id.* at 2248–54.

> on pain of criminal punishment persisted from the earliest days of the common law until 1973.[102]

The Court criticized the respondent's and their amici's arguments, stating it was unimportant that some states banned abortion at the time of the *Roe* decision or at the time the Fourteenth Amendment was adopted.[103] It reasoned that this argument negated the standard that has been traditionally applied by the Court in deciding whether an asserted right that is not specifically referenced in the Constitution is protected under the Fourteenth Amendment.[104] The Court stated that, in addition to failing to show that a constitutional right to abortion existed at the adoption of the Fourteenth Amendment, the Respondents also failed to provide evidence—state constitutional provision, statute, judicial decision, or learned treatise—that an abortion right existed prior to the end of the 20th century.[105]

The Court continued its critique of the *Roe* decision asserting that instead of relying on "great common-law authorities" for its historical analysis, *Roe* "relied largely on two articles by a pro-abortion advocate" that "have been discredited."[106] The Court concluded that "[c]ontinued reliance on such scholarship is unsupportable."[107] The Court also asserted that the respondents relied on an amicus brief which attempted to dismiss the importance of the state statutory laws in effect at the time of the adoption of the Fourteenth Amendment on the basis that the statutes were "enacted for illegitimate [legislative] reasons."[108] Rejecting this argument, the Court stated that it "has long disfavored arguments based on alleged legislative motives" and instead reasoned that there was "ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being."[109] Emphasizing that its "decision [was] not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests," the Court further noted that although some may disagree with the belief that abortion kills a human being, it saw "no reason to discount

102. *Id.* at 2248–49, 2253–54.
103. *See id.* at 2254.
104. *Id.*
105. *Id.*
106. *Id.* at 2254–55.
107. *Id.* at 2255.
108. *Id.*
109. *Id.* at 2255–56.

the significance of the state laws in question based on these amici's suggestions about legislative motive."[110]

The Court then turned its attention to the contention of "supporters of *Roe* and *Casey* . . . that the abortion right is an integral part of a broader entrenched right," termed by *Roe* as "a right to privacy" and *Casey* "as the freedom to make 'intimate and personal choices' that are 'central to personal dignity and autonomy[.]'"[111] The Court further highlighted the *Casey* Court's reasoning that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[112] The Court countered this reasoning, setting out its definition of "ordered liberty":

> While individuals are certainly free *to think* and *to say* what they wish about "existence," "meaning," the "universe," and "the mystery of human life," they are not always free *to act* in accordance with those thoughts. License to act on the basis of such beliefs may correspond to one of the many understandings of "liberty," but it is certainly not "ordered liberty."
>
> Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." But the people of the various States may evaluate those interests differently. . . . Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.[113]

The Court then discussed its position that the right to obtain an abortion is not founded in precedent.[114] It indicated that *Casey* based its decision on the holdings of cases related to:[115] "the right to marry a person of a different race;[116] the right to marry while in prison;[117]

110. *Id.* at 2256.
111. *Id.* at 2257.
112. *Id.*
113. *Id.*
114. *See id.*
115. *Id.*
116. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).
117. *See* Turner v. Safley, 482 U.S. 78, 99 (1987).

the right to obtain contraceptives;[118] and the right to reside with relatives."[119] Additionally, the Court referenced *Casey*'s reliance on cases involving "the right to make decisions about the education of one's children;[120] the right not to be sterilized without consent;[121] and the right in certain circumstances not to undergo involuntary surgery,[122] forced administration of drugs,[123] or other substantially similar procedures.[124]"[125] As to the Court's post-*Casey* precedent, the majority noted that the Respondents and Solicitor General relied on cases recognizing a "right to engage in private, consensual sexual acts,"[126] and "[the] right to marry a person of the same sex."[127]

In criticizing the *Casey* Court's (and *Roe* Court's) reliance on these precedents, the Court asserted that none of these decisions "involved the critical moral question posed by abortion [and] [t]hey are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way."[128] The Court further explained that proponents of *Roe* and *Casey* have not asserted that novel "scientific learning" requires a different response to the "underlying moral question" but rather that societal changes necessitate acknowledgment of a constitutional right to abortion, and if abortions are not available to women, they will be restricted in "exercising their freedom to choose the types of relationships they desire, and . . . will be unable to compete with men in the workplace and in other endeavors."[129] The Court noted that other Americans who hold the view that abortion should be regulated advance opposing arguments[130] regarding modern-day societal and legal advancements.[131] In recognizing that both the proponents of

118. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
119. *See* Moore v. East Cleveland, 431 U.S. 494, 503–06 (1977).
120. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 532, 536 (1952).
121. *See* Skinner v. Okla. *ex rel.*Williamson, 316 U.S. 535, 541 (1942).
122. *See* Winston v. Lee, 470 U.S. 753, 766 (1985).
123. *See* Washington v. Harper, 494 U.S. 210, 227, 236 (1990).
124. *See* Rochin v. California, 342 U.S. 165, 166, 172 (1952).
125. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257 (2022).
126. *Id.* at 2258.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131., *Id.* at 2258. These arguments include:

> [T]hat attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy; that leave for pregnancy and childbirth

Roe and *Casey*, as well as those espousing countering views, "both make important policy arguments," the Court concluded that, "supporters of *Roe* and *Casey* [have failed to show] that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States. [T]hus, [we] return the power to weigh those arguments to the people and their elected representatives."[132]

The next portion of the majority opinion focused specifically on the dissent and its reasoning and conclusions.[133] Justice Alito began this segment of the opinion by stating that "[t]he dissent is very candid that it cannot show that a constitutional right to abortion has any foundation, let alone a 'deeply rooted' one, 'in this Nation's history and tradition'" and that it fails to "identify any pre-*Roe* authority that supports such a right . . . ."[134] Justice Alito urged that this asserted failure was "devastating to [the dissent's] position" because it defies the Court's "'established method of substantive-due-process analysis' [which] requires that an unenumerated right be 'deeply rooted in this Nation's history and tradition' before it can be recognized as a component of the 'liberty' protected in the Due Process Clause."[135]

Reiterating that the dissent could not successfully argue that the abortion right meets this standard, the Court then took issue with the dissent's position "that the 'constitutional tradition' is 'not captured whole at a single moment,' and that its 'meaning gains content from the long sweep of our history and from successive judicial precedents.'"[136] The Court referred to this standard as "vague" and

> are now guaranteed by law in many cases; that the costs of medical care associated with pregnancy are covered by insurance or government assistance; that States have increasingly adopted 'safe haven' laws, which generally allow women to drop off babies anonymously; and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home. They also claim that many people now have a new appreciation of fetal life and that when prospective parents who want to have a child view a sonogram, they typically have no doubt that what they see is their daughter or son.

Id. at 2258–59.

132. *Id.* at 2259.
133. *See id.* at 2259–61.
134. *Id.* at 2259.
135. *Id.* at 2260.
136. *Id.*

described it as one that provides no definitive restraints on an "exercise of raw judicial power."[137] The Court continued:

> So without support in history or relevant precedent, *Roe*'s reasoning cannot be defended even under the dissent's proposed test, and the dissent is forced to rely solely on the fact that a constitutional right to abortion was recognized in *Roe* and later decisions that accepted *Roe*'s interpretation. Under the doctrine of *stare decisis*, those precedents are entitled to careful and respectful consideration. . . . [B]ut . . . [t]here are occasions when past decisions should be overruled, and . . . [*Roe*] is one of them.[138]

The Court proceeded to discuss stare decisis factors that should be considered when the Court has to determine if overturning a pivotal constitutional decision is warranted.[139] The Court indicated that "five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[140] Regarding the first factor, "the nature of the error," the Court likened *Roe* to *Plessy v. Ferguson,*[141] which had been overruled by *Brown v. Board of Education*,[142] a decision that "repudiated the 'separate but equal doctrine,' which had allowed States to maintain racially segregated schools and other facilities."[143] The Court stated that *Plessy* was "'egregiously wrong' on the day it was decided" and noted that *Roe* likewise "was also egregiously wrong and deeply damaging" because it "usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people."[144] Opining that *Casey* "perpetuated [*Roe*'s] errors," the Court concluded that the cases could not stand.[145]

137. *Id.*
138. *Id.* at 2261.
139. *See id.* at 2264.
140. *Id.* at 2265.
141. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding a Louisiana statute which required separate but equal railway accommodations based on race).
142. *See generally* Brown v. Bd. of Educ. (*Brown I)*, 347 U.S. 483 (1954) (holding that the "separate but equal" doctrine in public education constitutes a violation of the Equal Protection Clause).
143. *Dobbs*, 142 S. Ct. at 2262.
144. *Id.* at 2265.
145. *Id.*

Turning to the "quality of the reasoning" factor, the Court found that *Roe* did not meet this factor either because it "implicitly conferred a right to obtain an abortion, but it failed to ground its decision in text, history, or precedent . . . [and] relied on an erroneous historical narrative."[146] The Court asserted that the *Casey* plurality upheld the "central holding" of *Roe* without supporting most of the reasoning and "replaced [the trimester scheme of *Roe*] with an arbitrary 'undue burden' test and relied on an exceptional version of *stare decisis* that . . . [the] Court had never before applied and has never invoked since."[147] Additionally, in discussing the "workability" factor, the Court found that the "undue burden" test established under *Casey* "scored poorly on the workability scale[,]" which relates to whether a rule "can be understood and applied in a consistent and predictable manner."[148]

The Court began evaluating this factor by noting Justice Scalia's partial dissent in *Casey* where he concluded that the process to determine if a "burden is 'due' or 'undue' is 'inherently standardless."[149] The majority continued its critique of the *Casey* plurality by stating that the opinion attempted to clarify the vagueness of the undue burden test by establishing three "subsidiary rules" that were problematic themselves.[150] The majority asserted that the first of these "problematic" rules was "that 'a provision of law is invalid, if its purpose or effect is to place a *substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability.'"[151] The Court questioned this rule, stating that the determination of whether a specific obstacle is "substantial" is debatable and creates a "wide gray area."[152] Moving to the second sub-rule, the Court stated that the rule, which is applicable at each pregnancy stage, further confuses things.[153] The sub-rule

> states that measures designed "to ensure that the woman's choice is informed" are constitutional so long as they do not impose "an undue burden on the right." To the extent that

146. *Id.* at 2266.
147. *Id.*
148. *Id.* at 2272.
149. *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 992 (1992) (Scalia, J., dissenting)).
150. *Id.*
151. *Id.* (quoting *Casey*, 505 U.S. at 878).
152. *Id.*
153. *See id.*

> this rule applies to pre-viability abortions, it overlaps with the first rule and appears to impose a different standard.[154]

The Court went on to say that *Casey*'s failure to clear up this ambiguity "would lead to confusion down the line."[155]

Finally, the Court found the third sub-rule equally vague.[156] "Under that rule, '[*u*]*nnecessary health* regulations that have the purpose or effect of presenting a *substantial obstacle* to a woman seeking an abortion impose an *undue burden* on the right.'"[157] The Court complained that the rule not only incorporated the two previously discussed terms that it deemed vague and inconsistent—"undue burden" and "substantial obstacle"—but it also referred to another ambiguous phrase, "*unnecessary* health regulations," and *Casey* failed to explain what "unnecessary" means as used in the rule.[158]

To show "[t]he difficulty of applying *Casey*'s new rules," the Court referenced how the controlling decision in *Casey* and Justice Stevens' opinion, concurring in part and dissenting in part, came to different results.[159] "The controlling opinion found that Pennsylvania's 24-hour waiting period requirement and its informed-consent provision did not impose 'undue burden[s],' but Justice Stevens, applying the same test, reached the opposite result."[160] The Court then discussed how the "ambiguity of the 'undue burden' test" caused dissension in later cases in the Supreme Court and other courts of appeals.[161]

Finally, the Court concluded its discussion of the factors influencing its decision to overturn *Roe* by focusing on *Roe* and *Casey*'s "[e]ffect on other areas of law" and whether overruling the cases would "upend substantial reliance interests"—the final two factors.[162] Concerning the cases' effect on other areas of law, the Court asserted that the decisions have resulted in many key but unrelated doctrines being "distort[ed]."[163] As examples, the Court noted that the cases "have diluted the strict standard for facial constitutional challenges . . . the rule that statutes should be read

154. *Id.* (quoting *Casey*, 505 U.S. at 878).
155. *Id.* at 2273.
156. *See id.*
157. *Id.* (alteration in original) (quoting *Casey*, 505 U.S. at 878).
158. *See id.*
159. *Id.*
160. *Id.* (citation omitted).
161. *Id.* at 2273–74.
162. *Id.* at 2275–76.
163. *Id.*

where possible to avoid unconstitutionality . . . [a]nd they have distorted First Amendment doctrines."[164]

Regarding the "substantial reliance interests" factor, the court explained:

> [C]onventional, concrete reliance interests are not present here. Unable to find reliance in the conventional sense, the controlling opinion in *Casey* perceived a more intangible form of reliance. It wrote that "people [had] organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail" and that "[t]he 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" . . . . *Casey*'s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in "cases involving property and contract rights" . . . . [A]ssessing the novel and intangible form of reliance endorsed by the *Casey* plurality . . . depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women.[165]

Reasoning that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies," the Court concluded that *Dobbs* "returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office."[166]

After its discussion of the stare decisis factors, the Court then finalized the opinion by reiterating that, post-*Dobbs,* a rational-basis standard will govern state abortion laws that face constitutional challenges:[167]

> Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have

164. *Id.*
165. *Id.* at 2276–77 (citations omitted).
166. *Id.* at 2277 (citation omitted).
167. *Id.* at 2282–83.

> explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history. It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies" . . . . A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. . . . These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.[168]

Based on this reasoning, the majority held that Mississippi's Gestational Age Act was constitutional under a rational basis review, supported by legitimate interests including the legislature's asserted interest in "protecting the life of the unborn."[169]

2. The Dissenting Opinion

Justice Breyer, Justice Sotomayor, and Justice Kagan delivered the dissenting opinion.[170] The dissent began by affirming that the *Roe* and *Casey* precedents have safeguarded liberty and equal rights for women for nearly fifty years.[171]

168. *Id.* at 2283–84 (citations omitted).

169. *Id.* at 2284 (citation omitted). Additionally, in discussing the Mississippi legislature's "legitimate interests," the majority noted that the legislature had "also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the . . . use of this procedure 'for nontherapeutic or elective reasons [is] a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession.'" *Id.* (citation omitted).

170. *Id.* at 2239.

171. *Id.* at 2317 (Breyer, Sotomayor, & Kagan, JJ., dissenting). The dissent further noted that *Roe* had been "expressly reaffirmed" on two specific occasions prior to the *Casey* decision. *Id.* at 2321. "[T]he Court, over and over, enforced the constitutional principles *Roe* had declared." *Id.*

> *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be . . . . Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.[172]

As in *Roe*, the dissent stated *Casey* held that the right to choose was a "liberty" guaranteed by the Fourteenth Amendment and that the liberty guaranteed by the Fourteenth Amendment "encompasse[d] realms of conduct not specifically referenced in the Constitution . . . [or] protected at the time of . . . Amendment."[173] The dissent continued by stating that these precedents were not ignorant to the divisive nature of the abortion issue in our country and that there were heavily divergent perspectives on "the 'moral[ity]' of 'terminating a pregnancy, even in its earliest stage.'"[174] The dissent also acknowledged that the Court previously recognized that states had "legitimate interests" that start at the "outset of the pregnancy" in safeguarding a fetus's life "that may become a child."[175] Understanding these competing values, the Court "struck a balance," when it held in *Casey*

> that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a woman's life or health . . . [and] that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed . . . a State could not impose a "substantial obstacle" on a woman's "right to elect the procedure" as she (not the government) thought proper, in light of all the circumstances and complexities of her own life.[176]

172. *Id.* at 2317 (citations omitted).
173. *Id.* at 2321–22 (alteration to original).
174. *Id.* at 2317 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)).
175. *Id.* (quoting *Casey*, 505 U.S. at 846).
176. *Id.* (quoting *Casey*, 505 U.S. at 846).

In maintaining the balance, *Casey* "retained *Roe*'*s* 'central holding'" that states could only prohibit abortion post-viability[177] and reasoned that the point of viability was "'more workable' than any other marking place where the woman's liberty interest gave way to a State's efforts to preserve potential life . . . [because] [a]t that point, a 'second life' was capable of 'independent existence.'"[178] The dissent noted that *Casey* also decided that the framework delineated in *Roe* did not provide states "sufficient ability to regulate abortion prior to viability," which *Casey* clarified by holding that in addition to state regulation designed to "protect the women's health," states could also "ensure informed choice and could try to promote childbirth."[179]

In finding that the majority in *Dobbs* had "discard[ed]" the balance that *Roe* and *Casey* struck, the dissent noted that the majority's decision grants women, "from the very moment of fertilization, . . . no rights to speak of."[180] The dissent reasoned that although *Dobbs* addressed Mississippi's abortion ban, which pertained to abortions fifteen weeks post-gestation, states could bar abortions "after ten weeks, or five or three or one—or again, from the moment of fertilization."[181] The dissent continued that some states, anticipating the Court's overruling of *Roe*, had already done so.[182]

Additionally, the dissent noted that some states "have passed laws without any exceptions for when the woman is the victim of rape or incest. Under those laws, a woman will have to bear her rapist's child or a young girl her father's—no matter if doing so will destroy her life."[183] Pursuant to *Dobbs*, states may force a woman "to carry to term a fetus with severe physical anomalies" and could possibly argue that an abortion ban does not need to contain an exception for women who need to terminate the pregnancy due to a risk to their life or bodily harm.[184] The dissent explained that "[a]cross a vast array of circumstances, a State will be able to impose its moral choice on a woman and coerce her to give birth to a child."[185]

The dissent continued explaining the detrimental impact of the majority's decision. It first addressed the concern that because the enforcement of abortion restrictions will be left primarily to states,

177. *Id.* at 2322 (quoting *Casey*, 505 U.S. at 860).
178. *Id.* (quoting *Casey*, 505 U.S. at 870).
179. *Id.*
180. *Id.* at 2317 (alteration to original).
181. *Id.* at 2317–18.
182. *Id.* at 2318.
183. *Id.*
184. *Id.*
185. *Id.*

states could create criminal laws that would impact medical providers and lead to them facing extensive time in prison as a penalty for violation of the laws.[186] Or perhaps, women seeking an abortion may also face incarceration or the imposition of a fine as a penalty for violation of a state's law.[187] "And as Texas has recently shown, a State can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so."[188]

Noting that the majority had attempted to conceal the far-reaching geographic effects that its holding will have on women in different states and of different economic status, the dissent stated:

> Today's decision, the majority says, permits "each State" to address abortion as it pleases. That is cold comfort, of course, for the poor woman who cannot get the money to fly to a distant State for a procedure. Above all others, women lacking financial resources will suffer from today's decision. In any event, interstate restrictions will also soon be in the offing. After this decision, some States may block women from traveling out of State to obtain abortions, or even from receiving abortion medications from out of State. Some may criminalize efforts, including the provision of information or funding, to help women gain access to other States' abortion services.[189]

In expressing one of the most concerning aspects of the "geographically expansive" nature of the majority's opinion, the dissent indicated that nothing in the opinion prevents "the Federal Government from prohibiting abortions nationwide, once again from the moment of conception and without exceptions for rape or incest. If that happens, 'the views of [an individual state's] citizens' will not matter."[190]

> As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare.

186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* (quoting *Dobbs*, 142 S. Ct. at 2284 (majority opinion) (citation omitted)).
190. *Id.* (quoting *Dobbs*, 142 S. Ct. at 2240 (majority opinion)).

> Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.[191]

The dissent next warned of the impact that the majority opinion has on other precedents "protecting autonomous decisionmaking [sic] over the most personal of life decisions."[192] The dissent explained how for many years the Court had "linked" the right *Roe* and *Casey* protected "to other settled freedoms involving bodily integrity, familial relationships, and procreation. . . . [with] the right to terminate a pregnancy [arising] straight out of the right to purchase and use contraception. . . . [and] more recently, [the] rights of same-sex intimacy and marriage."[193] Reasoning that these rights are "all part of the same constitutional fabric," the dissent noted that it had little hope in the majority's assurances that "nothing it does [today] 'cast[s] doubt on precedents that do not concern abortion.'"[194] The dissent explained that the sole reasoning for the majority's holding was that the right to obtain an abortion was not "deeply rooted" in our nation's history[195] and criticized this rationale, stating that "[t]he same could be said, though, of most of the rights the majority claims it is not tampering with."[196] Thus, the dissent concluded that "all rights that have no history stretching back to the mid-19th century are insecure."[197]

The dissent further indicated that "early law in fact [did] provide some support for abortion rights," highlighting that "[c]ommon law authorities" did not consider abortion a crime prior to the point of "quickening" and "early American law followed the common-law

191. *Id.* at 2318–19.
192. *Id.* at 2319.
193. *Id.* (alteration to original).
194. *Id.* (alteration to original).
195. *Id.*
196. *Id.*
197. *Id.*

rule."[198] Turning to 1868, the period when the Fourteenth Amendment was ratified, the dissent stated:

> What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So, it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase "We the People" . . . . Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights.[199]

The dissent next posed the question, "[s]o how is it that, as *Casey* said, our Constitution, read now, grants rights to women, though it did not in 1868?"[200] In response, the dissent stated, "[t]he answer is that this Court has rejected the majority's pinched view of how to read our Constitution. 'The Founders,' . . . 'knew they were writing a document designed to apply to ever-changing circumstances over centuries.'"[201] As such,

> [T]he Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation. . . [most] prevalent[ly] . . . in construing the . . . Fourteenth Amendment['s] . . . guarantees of 'liberty' and 'equality' for all.[202]

Further discussing the "sphere of liberty" protected by the Fourteenth Amendment, the dissent continued, "the Court has 'vindicated [the] principle' over and over that (no matter the sentiment in 1868) 'there is a realm of personal liberty which the government may not enter'—especially relating to 'bodily integrity'

198. *Id.* at 2324 (alteration to original). "Quickening" was defined as "the point when the fetus moved in the womb." *Id.*
199. *Id.* at 2324–25.
200. *Id.* at 2325.
201. *Id.* (quoting NLRB v. Noel Canning, 573 U.S. 513, 533–34 (2014)).
202. *Id.* at 2325–26 (alteration to original).

and 'family life.'"[203] Considering the Court's case precedent safeguarding "bodily integrity," the dissent noted a quote from an 1891 opinion: "'No right,' in this Court's time-honored view, 'is held more sacred, or is more carefully guarded,' than 'the right of every individual to the possession and control of his own person.'"[204] The dissent further noted that "[t]here are few greater incursions on a body than forcing a woman to complete a pregnancy and give birth."[205]

Reiterating that "*Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation[,]"[206] the dissent reasoned that those decisions

> safeguard[ed] particular choices about whom to marry; whom to have sex with; what family members to live with; how to raise children—and crucially, whether and when to have children. In varied cases, the Court explained that those choices—"the most intimate and personal" a person can make—reflect fundamental aspects of personal identity; they define the very "attributes of personhood."[207]

The dissenting opinion proceeded with a discussion of "[t]he majority's cavalier approach to overturning the Court's precedents" and its disregard for the doctrine of stare decisis—"that things decided should stay decided unless there is a very good reason for change."[208] It urged that "[n]o recent developments, in either law or fact, have eroded or cast doubt on [*Roe* or *Casey*]. Nothing, in short, has changed."[209] The dissent noted that *Casey* assessed the very arguments that the majority raised in overturning *Roe* and concluded that doing so was unwarranted.[210] As such, the dissent concluded that the overturning of *Roe* was thus the result of one sole reason—a "composition" change of the Court.[211] It continued that the Court has often held that "[*s*]*tare decisis* . . . 'contributes to the actual and perceived integrity of the judicial process' . . . ensuring that decisions are 'founded in the law rather than in the proclivities of

203. *Id.* at 2327.
204. *Id.* at 2328 (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)).
205. *Id.*
206. *Id.*
207. *Id.* (alteration to original) (quoting *Casey*, 505 U.S. at 851).
208. *Id.* at 2319.
209. *Id.* (alteration to original).
210. *Id.*
211. *Id.* at 2320.

individuals.'"[212] Reasoning that the Court had "depart[ed] from its obligation to faithfully and impartially apply the law[,]" the dissent concluded that the majority's decision reflects that "the proclivities of individuals rule."[213]

Acknowledging that stare decisis is not an "inexorable command," and that it is sometimes warranted to overrule a prior decision, the dissent specified that there must be a valid reason to do so "over and above the belief 'that the precedent was wrongly decided'"[214] as the majority had asserted.[215] The dissent also challenged the majority's argument that *Casey*'s "undue burden" standard was unworkable,[216] explaining that the undue burden standard was like many other general standards "ubiquitous in the law, . . . particularly in constitutional adjudication."[217] It noted that the Court often outlines "flexible standards" to be applied on a case-by-case basis for different circumstances when it has "to give effect to the Constitution's broad principles."[218] The dissent identified other instances where the Court has inquired about "undue or substantial burdens" in areas related to interstate commerce, voting, and speech.[219] It also disputed the majority's assertion that the standard would cause "unusual difficulties" in its application by lower courts.[220] In recognizing that the standard had caused some disagreement among lower courts, the dissent responded that this was "to be expected in the application of any legal standard which must accommodate life's complexity" and that the majority had "overstate[d] the divisions among judges applying the standard."[221]

The dissent then critiqued the majority's standard that a state's abortion regulations "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."[222] The dissent highlighted some of the interests identified by the majority such as "respect for and

212. *Id.*
213. *Id.* (alterations to original).
214. *Id.* at 2334 (citation omitted).
215. *Id.*
216. *Id.* at 2335.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* (alteration to original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992)).
222. *Id.* at 2284 (majority opinion); *id.* at 2336 (Breyer, Sotomayor & Kagan, JJ., dissenting).

preservation of prenatal life," "protection of maternal health," "elimination of [certain] . . . 'medical procedures,'" and "mitigation of fetal pain," and noted that the Court's standard will undoubtedly "face critical questions" regarding how a court should apply the standard.[223] It continued: "Must a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force her to incur, before the Fourteenth Amendment's protection of life kicks in?"[224]

Next, the dissent pointed to the possible effects of the majority's opinion on interstate conflicts such as creating confusion as to whether a state can prohibit a woman from traveling from one state to another for an abortion or prevent medicines from being mailed state to state that would allow a woman to have a "medication abortion[]."[225] The dissent reasoned, "[t]he Constitution protects travel and speech and interstate commerce, so today's ruling will give rise to a host of new constitutional questions."[226] Instead of sparing judges from "unwieldy tests or extricat[ing] them from the sphere of [abortion] controversy," the majority has replaced the "known, workable, and predictable" undue burden standard, with a new standard that will likely be more difficult to apply.[227]

The opinion next addressed the reliance interests of those women who have relied on the holdings of *Roe* and *Casey* for decades.[228] The dissent noted that "'[t]he most striking feature of the [majority's opinion] is the absence of any serious' discussion of how its ruling will affect women."[229] The dissent recounted how the *Casey* Court recognized that for twenty years post-*Roe* "individuals 'ha[d] organized intimate relationships and made' significant life choices 'in reliance on the availability of abortion in the event that contraception should fail.'"[230] It further acknowledged that since *Casey*, "that reliance has solidified."[231]

> For half a century now, in *Casey*'s words, "[t]he ability of women to participate equally in the economic and social life

223. *Id.* at 2284 (majority opinion) (alteration to original); *id.* at 2336 (Breyer, Sotomayor & Kagan, JJ., dissenting).
224. *Id.* at 2336 (Breyer, Sotomayor & Kagan, JJ., dissenting).
225. *Id.* at 2337.
226. *Id.*
227. *Id.* (alteration to original).
228. *Id.* at 2338.
229. *Id.* at 2343 (alteration to original).
230. *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 835 (1992)).
231. *Id.*

> of the Nation has been facilitated by their ability to control their reproductive lives." Indeed, all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe*'s and *Casey*'s protections. The disruption of overturning *Roe* and *Casey* will therefore be profound.[232]

The dissent then observed how "[a]bortion is a common medical procedure and a familiar experience" for women in America, noting that "[a]bout 18 percent of pregnancies in this country end in abortion" and that nearly one-fourth of American women will have obtained an abortion prior to turning forty-five.[233] It further explained that the *Casey* Court was aware, like the dissent, that individuals "rely on their ability to control and time pregnancies when making countless decisions" such as deciding "where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships."[234] It further noted that women may depend on an abortion alternative when a contraceptive fails or there is no opportunity to use a contraceptive, like in instances of rape, as well as in times where life circumstances change during pregnancy, including financial, familial, or medical situations effecting the mother or fetus.[235] The majority's removal of the right to obtain an abortion, the dissent opined, obliterates all of these expectations that women once safely held and "diminishes [their] opportunit[y] to participate fully and equally in the Nation's political, social, and economic life."[236]

The dissent critiqued the majority's rebuttal that "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions."[237] In response, the dissent explained that

> [e]ven the most effective contraceptives fail, and effective contraceptives are not universally accessible. Not all sexual activity is consensual and not all contraceptive choices are made by the party who risks pregnancy. The Mississippi law at issue here, for example, has no exception for rape or

232. *Id.* (quoting *Casey*, 505 U.S. at 835) (citation omitted).
233. *Id.* at 2343–44.
234. *Id.* at 2344.
235. *Id.* (alterations to original).
236. *Id.*
237. *Id.* (quoting *Casey*, 505 U.S. at 856).

> incest, even for underage women. Finally, . . . some women decide to have an abortion because their circumstances change during a pregnancy.[238]

The dissent next addressed the reliance interests of women with little financial means, noting how a more affluent woman living in a state with an abortion ban can pay to travel to another state for the procedure; however, this is not a reality for women who cannot afford those travel expenses.[239] The dissent concluded its discussion on reliance interests by recognizing that many of the Court's decisions assessing reliance have in fact related to commercial matters such as property or contract interests.[240] The dissent rejected, however, that this was the only proper context to consider reliance interests, stating that none of the prior Court's decisions "hold[] that interests must be analogous to commercial ones to warrant *stare decisis* protection" and that "[*s*]*tare decisis* requires that the Court calculate the costs of a decision's repudiation on those who have relied on the decision, not on those who have disavowed it."[241]

Finally, deploring the overturning of *Roe* and *Casey*, the dissent stated that the "Court [had] betrayed its guiding principles."[242] It concluded: "With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent."[243]

III. THE LEGAL LANDSCAPE OF ABORTION POST-*DOBBS*

A. Federal Action: Presidential Executive Orders

Following *Dobbs*, President Biden quickly issued his first of two executive orders designed to protect the reproductive rights of individuals and ensure access to abortion services.[244] Prior to the release of the Protecting Access to Reproductive Health Care Services executive order, President Biden strongly rebuked the majority's decision, calling it a "terrible, extreme, and . . . wrongheaded decision."[245] He stated that the majority's decision

238. *Id.* (citation omitted).
239. *Id.* at 2344–45.
240. *Id.* at 2346.
241. *Id.* at 2346–47 (alteration to original).
242. *Id.* at 2350 (alteration to original).
243. *Id.*
244. *Fact Sheet: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services*, *supra* note 8.
245. Joseph R. Biden, President of U.S., Remarks by President Biden on Protecting Access to Reproductive Health Care Services (July 8, 2022), https://www.whitehouse.gov/

"was not a decision driven by the Constitution . . . [or] driven by history."[246] But rather the decision "was an exercise in raw political power" and "based on the reasoning of the Court, there is no constitutional right to choose."[247] The President encouraged that the only avenue to reinstate that right was for women to exercise their right to vote.[248] He further noted that the majority decision likewise recognized women's ability to impact abortion legislation through their "electoral or political power."[249]

The President next spoke on national legislation to safeguard abortion accessibility, stating that "[t]he fastest way to restore . . . *Roe* is to pass a national law codifying *Roe,* which I will sign immediately upon its passage at my desk."[250] Turning the discussion to state abortion legislation that had passed post-*Dobbs* or shortly before, the President rebuked the bans and specifically noted those laws that did not contain exceptions for rape and incest:

> What we're witnessing is a giant step backwards in much of our country. Already, the bans are in effect in 13 states. Twelve additional states are likely to ban choice in the . . . coming weeks. And in a number of these states, the laws are so extreme they have raised the threat of criminal penalties for doctors and healthcare providers. *They're so extreme that many don't allow for exceptions, even for rape or incest. Let me say that again: Some of the states don't allow for exceptions for rape or incest*.[251]

1. First Executive Order: Protecting Access to Reproductive Health Care Services

The stated purpose of the first executive order, Protecting Access to Reproductive Health Care Services, was to build upon the initiatives previously taken by the Biden Administration to protect individuals' reproductive rights by:

briefing-room/speeches-remarks/2022/07/08/remarks-by-president-biden-on-protecting-access-to-reproductive-health-care-services/ [https://perma.cc/V94G-79MT].

246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.* (quoting *Dobbs*, 142 S. Ct. at 2277 (majority opinion)).
250. *Id.*
251. *Id.* (emphasis added).

> Safeguarding access to reproductive health care services, including abortion and contraception; [p]rotecting the privacy of patients and their access to accurate information; [p]romoting the safety and security of patients, providers, and clinics; and [c]oordinating the implementation of Federal efforts to protect reproductive rights and access to health care.[252]

In terms of safeguarding access to reproductive health care services, the President directed the Secretary of Health and Human Services (HHS) to initiate specific measures within thirty days of the order and provide a report to him regarding the status of HHS' efforts.[253] Some of these measures included taking additional steps to safeguard and broaden abortion accessibility, including access to medication abortion; making sure that any patient, those pregnant and those suffering from pregnancy loss, could obtain emergency medical care; expanding accessibility "to the full range of reproductive health services . . . such as access to emergency contraception and long-acting reversible contraception," while offering protection to those providers who furnish these services.[254]

Additionally, HHS was charged with initiating greater public education efforts and outreach to communities in order to prevent misinformation regarding reproductive rights.[255] The President also specified that "[t]he Attorney General and the White House Counsel will convene private pro bono attorneys, bar associations, and public interest organizations to encourage robust legal representation of patients, providers, and third parties lawfully seeking or offering reproductive health care services throughout the country."[256]

The order spoke of safeguarding the privacy of patients and making sure that accurate information is available to them, as well as "address[ing] the transfer and sales of sensitive health-related data [and] combatting digital surveillance related to reproductive health care services."[257] The President called on the Chair of the Federal Trade Commission (FTC) to assist with these efforts, as well as the Secretary of HHS and the Attorney General to consider alternatives to counter "deceptive or fraudulent practices, including online

252. *Fact Sheet: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services*, *supra* note 8.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.* (alterations to original).

[practices]."[258] HHS was also tasked with considering other measures, including the use of the Health Insurance Portability and Accountability Act (HIPAA) to assist in securing personal reproductive health care information.[259]

The order next focused on the increased risk and safety issues that those seeking and providing reproductive health care will face by promising added security for patients, health providers, and clinics, including mobile clinics.[260] Finally, the order directed "HHS[, the Attorney General,] and the White House Gender Policy Council to establish and lead an interagency Task Force on Reproductive Health Care Access, responsible for coordinating Federal interagency policymaking and program development."[261] The Attorney General was also charged with offering "technical assistance to states affording legal protection" to patients who travel from out of state and health providers who furnish "legal reproductive health care."[262]

2. Second Executive Order: Securing Access To Reproductive and Other Healthcare Services

On August 3, 2022, President Biden signed a second executive order to aid in protecting abortion accessibility and reproductive healthcare.[263] The order was executed during the first meeting of a newly created task force on accessibility to reproductive health care services, "comprised of representatives from multiple departments across the federal government."[264]

The executive order, Securing Access To Reproductive And Other Healthcare Services,

> [H]elps women travel out of state to receive abortions, ensures health care providers comply with federal law so women aren't delayed in getting care and advances research and data collection "to evaluate the impact that this

258. *Id.* (alterations to original).
259. *Id.* (alterations to original).
260. *Id.*
261. *Id.*
262. *Id.*
263. Donald Judd & Kate Sullivan, *Biden Signs New Executive Order on Abortion Rights: 'Women's Health and Lives Are on the Line*,*'* CNN, https://www.cnn.com/2022/08/03/politics/joe-biden-abortion-executive-order/index.html [https://perma.cc/L3L7-3CUW] (Aug. 3, 2022, 5:31 PM); *Fact Sheet: President Biden Issues Executive Order at the First Meeting of the Task Force on Reproductive Healthcare Access*, *supra* note 9.
264. Judd & Sullivan, *supra* note 263.

> reproductive health crisis is having on maternal health and other health conditions and outcomes."[265]

The order specifically directed the Secretary of HHS to advance access measures to promote reproductive health care services accessibility, "including through Medicaid" for individuals traveling to another state to obtain services related to reproductive healthcare.[266] It also directed the Secretary to "consider all appropriate actions to ensure health care providers comply with Federal non-discrimination laws so that women receive medically necessary care without delay" which could include offering "technical assistance" to providers who lack clarity or are uncertain about care they can provide following the *Dobbs* decision.[267] Additionally, in order to properly determine how women's health will be affected by restrictions on reproductive health care services accessibility, the Secretary was tasked with assessing and further enhancing the "research, data collection, and data analysis efforts at the National Institutes of Health and the Centers for Disease Control and Prevention on maternal health and other health outcomes."[268]

At a press conference regarding the order, White House press secretary Karine Jean-Pierre, was asked about how the order "avoids running afoul of the Hyde Amendment, which prohibits the use of federal funds to perform abortions."[269] Noting that HHS would prepare details on the how the federal government would assist the states in providing care under Medicaid waivers, Jean-Pierre went on to state that

> Medicaid provides comprehensive health care to women with low incomes—this care includes family planning services such as contraception, non-emergency medical, transportation, and support services like targeted case management, which allows health care providers to help patients coordinate their care . . . [a]nd it also includes abortion care in certain circumstances, as accepted by the Hyde Amendment, which is rape, incest and life of the mother. The executive order . . . "will cover care that is

265. *Id.*
266. *Fact Sheet: President Biden Issues Executive Order at the First Meeting of the Task Force on Reproductive Healthcare Access*, *supra* note 9.
267. *Id.*
268. *Id.*
269. Judd & Sullivan, *supra* note 263.

> otherwise part of Medicaid," including non-emergency medical travel and other health care services.[270]

B. Federal Action: Legislative Initiatives

On July 15, 2022, following the *Dobbs* decision, the U.S. House of Representatives passed two bills designed to provide federal protection for abortion accessibility.[271] H.R. 8296, the Women's Health Protection Act of 2022, and H.R. 8297, the Ensuring Access to Abortion Act of 2022, sponsored by Democrat Representatives Judy Chu and Lizzie Fletcher, respectively, are not expected to have any success in the Senate, "where there is not enough support for either piece of legislation to overcome the filibuster's 60-vote threshold."[272] H.R. 8296, which was initially passed in the House in September 2021[273] after several states passed legislation banning abortion, "codif[ies] abortion rights protections into federal law."[274] H.R. 8297 is aimed at allowing individuals to freely travel to other states to obtain an abortion and prevents any restrictions that would inhibit a person seeking an abortion from going to another state for the procedure.[275]

1. The Women's Health Protection Act of 2022

The Women's Health Protection Act of 2022 provides in pertinent part:

> SEC. 4. PERMITTED SERVICES.
> (a) GENERAL RULE.—A health care provider has a statutory right under this Act to provide abortion services, and may provide abortion services, and that provider's patient has a corresponding right to receive such services, without any of the following limitations or requirements:

270. *Id.*
271. Foran & Wilson, *supra* note 11.
272. *Id.*
273. H.R. 3755, 117th Cong. (2021) (as passed by House of Representatives, Sept. 24, 2021), https://www.congress.gov/bill/117th-congress/house-bill/3755/text [https://perma.cc/ULL8-VC5V].
274. Rebecca Shabad, *House Passes Bills to Protect Abortion Rights; Senate GOP to Block the Legislation*, CNBC (July 15, 2022, 1:57 PM), https://www.cnbc.com/2022/07/15/house-passes-bills-to-protect-abortion-rights-senate-gop-to-block-the-legislation.html [https://perma.cc/U8H7-6TNJ] (alteration to original).
275. *Id.*

(1) A requirement that a health care provider perform specific tests or medical procedures in connection with the provision of abortion services, unless generally required for the provision of medically comparable procedures.
(2) A requirement that the same health care provider who provides abortion services also perform specified tests, services, or procedures prior to or subsequent to the abortion.
(3) A requirement that a health care provider offer or provide the patient seeking abortion services medically inaccurate information in advance of or during abortion services.
(4) A limitation on a health care provider's ability to prescribe or dispense drugs based on current evidence-based regimens or the provider's good-faith medical judgment, other than a limitation generally applicable to the medical profession.
(5) A limitation on a health care provider's ability to provide abortion services via telemedicine, other than a limitation generally applicable to the provision of medical services via telemedicine.
(6) A requirement or limitation concerning the physical plant, equipment, staffing, or hospital transfer arrangements of facilities where abortion services are provided, or the credentials or hospital privileges or status of personnel at such facilities, that is not imposed on facilities or the personnel of facilities where medically comparable procedures are performed.
(7) A requirement that, prior to obtaining an abortion, a patient make one or more medically unnecessary in-person visits to the provider of abortion services or to any individual or entity that does not provide abortion services.
(8) A prohibition on abortion at any point or points in time prior to fetal viability, including a prohibition or restriction on a particular abortion procedure.
(9) A prohibition on abortion after fetal viability when, in the good-faith medical judgment of the treating health care provider, continuation of the pregnancy would pose a risk to the pregnant patient's life or health.
(10) A limitation on a health care provider's ability to provide immediate abortion services when that health care provider believes, based on the good-faith medical

judgment of the provider, that delay would pose a risk to the patient's health.

(11) A requirement that a patient seeking abortion services at any point or points in time prior to fetal viability disclose the patient's reason or reasons for seeking abortion services, or a limitation on the provision or obtaining of abortion services at any point or points in time prior to fetal viability based on any actual, perceived, or potential reason or reasons of the patient for obtaining abortion services, regardless of whether the limitation is based on a health care provider's degree of actual or constructive knowledge of such reason or reasons.[276]

* * *

SEC. 5. APPLICABILITY AND PREEMPTION.

(a) IN GENERAL.—

(1) Except as stated under subsection (b), this Act supersedes and applies to the law of the Federal Government and each State government, and the implementation of such law, whether statutory, common law, or otherwise, and whether adopted before or after the date of enactment of this Act, and neither the Federal Government nor any State government shall administer, implement, or enforce any law, rule, regulation, standard, or other provision having the force and effect of law that conflicts with any provision of this Act, notwithstanding any other provision of Federal law, including the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.).

(2) Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.[277]

In terms of enforcement, the Attorney General, on behalf of the United States, may bring a civil action against any State or

276. Women's Health Protection Act of 2022, H.R. 8296, 117th Cong. § 4(a) (2022), https://www.congress.gov/bill/117th-congress/house-bill/8296/text [https://perma.cc/RQD4-EX56]; *see also id.* § 4(b) (providing additional general protections to those listed in Section 4(a)).

277. *Id.* § 5(a); *see also id.* § 5(b) (providing limitations on the applicability of H.R. 8296).

government official in violation of the Act.[278] If the court finds a violation,[279] it "shall hold unlawful and set aside the limitation or requirement" that is in violation of Section 4 of this Act.[280] Additionally, a private right of action is granted to "[a]ny individual or entity, including any health care provider or patient" that is "adversely affected by an alleged violation of this Act[.]"[281]

The date of enactment was established as the effective date of the Act, which would apply to any "restrictions on the provision of, or access to, abortion services . . . enacted or imposed prior to or after the date of enactment . . . except as otherwise provided in this Act."[282]

2. The Ensuring Access to Abortion Act of 2022

The Ensuring Access to Abortion Act of 2022 provides in pertinent part:

> SEC. 2. INTERFERENCE WITH INTERSTATE ABORTION SERVICES PROHIBITED.
> (a) INTERFERENCE PROHIBITED.—No person acting under color of State law, including any person who, by operation of a provision of State law, is permitted to implement or enforce State law, may prevent, restrict, or impede, or retaliate against, in any manner—
> (1) a health care provider's[283] ability to provide, initiate, or otherwise enable an abortion service[284] that is lawful in

278. *Id.* § 8(a).

279. *Id.* § 7. Section 7 of the Act, Rules of Construction, provides that "[i]n interpreting the provisions of this Act, a court shall liberally construe such provisions to effectuate the purposes of the Act." *Id.* § 7(a). Section 7 further states that no provision of the Act should be "construed to authorize any government to interfere with, diminish, or negatively affect a person's ability to obtain or provide abortion services." *Id.* § 7(b).

280. *Id.* § 8(a).

281. *Id.* § 8(b)(1). Section 8(b)(2) further provides that "[a] health care provider may commence an action for relief on its own behalf, on behalf of the provider's staff, and on behalf of the provider's patients who are or may be adversely affected by an alleged violation of this Act." *Id.* § 8(b)(2).

282. *Id.* § 6.

283. *See* Ensuring Access to Abortion Act of 2022, H.R. 8297, 117th Cong. § 2(d) (2022), https://www.congress.gov/bill/117th-congress/house-bill/8297/text [https://perma.cc/X2J5-8RSV] (defining "health care provider" as "any entity or individual . . . engaged in the delivery of health care services, including abortion services" and is "licensed or certified to perform such service under applicable State law").

284. *See id.* (defining "abortion service" as "an abortion, including the use of any drug approved or licensed by the Food and Drug Administration for the termination of a

the State in which the service is to be provided to a patient who does not reside in that State;
(2) any person or entity's ability to assist a health care provider to provide, initiate, or otherwise enable an abortion service that is lawful in the State in which the service is to be provided to a patient who does not reside in that State, if such assistance does not violate the law of that State;
(3) any person's ability to travel across a State line for the purpose of obtaining an abortion service that is lawful in the State in which the service is to be provided;
(4) any person's or entity's ability to assist another person traveling across a State line for the purpose of obtaining an abortion service that is lawful in the State in which the service is to be provided; or
(5) the movement in interstate commerce, in accordance with Federal law or regulation, of any drug[285] approved or licensed by the Food and Drug Administration for the termination of a pregnancy.[286]

Like the Women's Health Protection Act of 2022, the Attorney General may commence a civil action against any violator of the Ensuring Access to Abortion Act of 2022,[287] seeking "declaratory or injunctive relief."[288] Additionally, under the Act, individuals are granted a private right of action against any person who interferes with interstate abortion services.[289] Individuals can seek "declaratory and injunctive relief, and for such compensatory damages as the court determines appropriate, including for economic losses and for emotional pain and suffering."[290]

C. State Action: Status of States' Abortion Laws

A recent study conducted after the *Dobbs* decision reviewed the states that had enacted or were on the cusp of enacting strict abortion

pregnancy" and "any health care service related to or provided in conjunction with an abortion").

285. *See id.* (giving the term "drug" "the meaning given such term in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321)").
286. *Id.* § 2.
287. *Id.* § 2(b).
288. *Id.*
289. *Id.* § 2(c).
290. *Id.*

laws following the decision.[291] As of August 1, 2022, twenty-three states were identified.[292] Thirteen of these states had "trigger laws" in place that were "designed to be 'triggered' and take effect automatically or by quick state action" if *Roe v. Wade* was overturned.[293] The thirteen "trigger law" states include Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming.[294] "While all trigger bans have the same intent of banning abortion, their implementation mechanisms, timelines and other details differ."[295]

Additionally, of the twenty-three states identified, fifteen do not provide exceptions for rape or incest.[296] The fifteen states not offering a rape or incest exception are Alabama, Arizona, Arkansas, Florida, Kentucky, Louisiana, Michigan, Missouri, Ohio, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin.[297] Georgia, Idaho, Indiana, North Dakota, South Carolina, Utah, and Wyoming have laws that explicitly delineate abortion exceptions for rape *and* incest victims.[298] Mississippi's statute, however, only specifies that it allows for an exception for rape victims.[299] Nevertheless, Mississippi legislators indicate that the state's laws allow for exceptions in cases of rape and incest.[300] All of the abortion laws at issue in the study represent total bans, except for those

291. Jacobson, *supra* note 14.

292. *Id.*

293. Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here's What Happens When* Roe *is Overturned*, GUTTMACHER INST. (June 6, 2022), https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned [https://perma.cc/Q9KV-72DH].

294. *Id.*

295. *Id.*

296. Jacobson, *supra* note 14.

297. *Id.*

298. *Id.*

299. MISS. CODE ANN. § 41-41-45 (West 2022). Mississippi's current statute differs from the 2018 abortion statute that was upheld in *Dobbs*, which did not provide for any rape or incest abortion exceptions. *See id.* § 41-41-191.

300. Nick Mordowanec, *Nearly All Abortions in Mississippi Will Be Illegal in 10 Days*, NEWSWEEK (June 27, 2022, 11:49 AM), https://www.newsweek.com/nearly-all-abortions-mississippi-will-illegal-10-days-1719481 [https://perma.cc/GM8W-CRU7]. Following *Dobbs*, Republican Mississippi State Senator Joey Fillingane stated, "In about a week and a half, you'll have zero abortions taking place at the clinic in Jackson, or in hospitals or any place else, except to save the life of the mother, or if it's proven, and not just an allegation, of a rape or an incest[.]" *Id.* Senator Fillingane "authored the 2007 trigger law language in addition to co-sponsoring the state's 2018 abortion law that was upheld by the Supreme Court" in *Dobbs*. *Id.*

codified in Georgia and Ohio, which each prohibit abortions after six weeks.[301] South Carolina also originally imposed a six-week ban, but that ban was recently suspended while the state's supreme court considers whether a privacy right to abortion exists within the state's constitution.[302] In addition, Florida's current law prohibits abortions after fifteen weeks.[303]

The section that follows highlights abortion laws passed by Texas and Florida shortly before the *Dobbs* decision, some of the most restrictive laws among all states,[304] and Texas' trigger law, which went into effect thirty days after the transmission of the *Dobbs* decision.[305] This section concludes with a discussion of Indiana's new abortion laws, the first legislation to pass post-*Dobbs*.[306]

1. Florida: House Bill 5

On April 14, 2022, roughly two-and-a-half months prior to the *Dobbs* decision, Florida Governor Ron DeSantis signed a bill into

301. Jacobson, *supra* note 14.

302. Alison Durkee, *South Carolina Senate Rejects Near-Total Abortion Ban—but Doubles Down on 6-Week Limit*, FORBES (Sept. 8, 2022, 9:32 PM), https://www.forbes.com/sites/alisondurkee/2022/09/08/south-carolina-senate-rejects-near-total-abortion-ban-but-doubles-down-on-6-week-limit/?sh=4a7518fc225d [https://perma.cc/Y8ZH-L4RP] ("South Carolina had a six-week abortion ban that went into effect after the Supreme Court overturned *Roe v. Wade*, but was then blocked in court, once again making abortion legal in the state."); s*ee also* Melissa Meyers, *Sexual Assault Victims Could Face More Trouble with Abortions After* Roe v. Wade *Overturned*, WBTW, https://www.wbtw.com/news/grand-strand/sexual-assault-victims-could-face-more-trouble-with-abortions-after-roe-v-wade-overturned/ [https://perma.cc/QY6D-5N5Z] (July 11, 2022, 6:56 PM) (noting the six-week ban included exceptions for rape and incest); Jeffrey Collins, *South Carolina Senators Reject Abortion Ban After Republican Lawmaker Threatens Filibuster*, PBS (Sept. 8, 2022, 9:01 PM), https://www.pbs.org/newshour/politics/republican-lawmaker-filibusters-south-carolina-abortion-ban-bill [https://perma.cc/TG9J-RPR8] ("South Carolina's six-week ban is currently suspended as the state Supreme Court reviews whether it violates privacy rights. In the meantime, the state's 2016 ban on abortions 20 weeks after conception is in effect."). A South Carolina statute ratified in 2016 also prescribes exceptions for rape and incest. S.C. CODE ANN. § 44-41-680(B)(1)–(2) (2022).

303. Jacobson, *supra* note 14.

304. *See supra* note 16 and accompanying text.

305. Ariane de Vogue, *Supreme Court Officially Transmits Its Judgment Overturning* Roe v. Wade*, Clearing the Way for State Restrictions*, CNN, https://www.cnn.com/2022/07/26/politics/abortion-supreme-court/index.html [https://perma.cc/5RHH-PZXV] (July 26, 2022, 6:52 PM).

306. Davis, *supra* note 18.

law banning abortion after fifteen weeks of pregnancy.[307] The legislation did not include any exceptions for situations involving rape, incest, or trafficking.[308] It did permit exemptions for instances in which the pregnancy poses a "serious risk" to the mother, or in which a doctor discovers a fetal abnormality that is fatal.[309] These diagnoses must be confirmed in writing by at least two physicians in order for a woman to be exempt from the ban.[310] Per the statute, anyone violating the law could be imprisoned for up to five years.[311] Additionally, doctors and other medical providers "could lose their licenses and face administrative fines of $10,000 for each violation."[312]

Democrat senators objected strongly to the chamber's passage of legislation.[313] For example, Senator Lauren Book, who shared with her colleagues that she was a rape victim, "implored lawmakers to include an exemption for women who became pregnant as a result of sexual violence."[314] Nevertheless, the bill passed in the Senate with a 23–15 vote.[315]

Prior to the bill's passing, Florida's laws allowed a woman to have an abortion through the second trimester, "making it one of the most permissive states for abortion in the southeast."[316] Many proponents of abortion have stated that many women travel from states located close to Florida for abortions, "meaning changes to Florida's law could be felt all throughout the region."[317] "According to the US Centers for Disease Control and Prevention, Florida reported 71,914 abortions in 2019, or 18.5 per 1,000, the third highest rate in the country."[318]

307. Contorno, *supra* note 17.
308. *Id.*
309. *Id.*
310. *Id.*; FLA. STAT. ANN. § 390.0111(1)(a) (West 2022).
311. *Id.* § 390.0111(10)(a) (referring to section 775.082(3)(e), which indicates that, in Florida, a third-degree felony is punishable by a term of imprisonment not exceeding five years).
312. Jennifer Kay, *DeSantis Suspends Prosecutor for Refusal to Enforce Abortion Ban*, BLOOMBERG GOV'T (Aug. 4, 2022, 4:33 PM), https://about.bgov.com/news/desantis-suspends-prosecutor-for-refusal-to-enforce-abortion-ban/ [https://perma.cc/QE7S-SCCM].
313. Contorno, *supra* note 17.
314. *Id.* ("Book broke down into tears after the proposed amendment was rejected by Republicans, who have a majority in the chamber.").
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*

Although Florida's abortion ban was scheduled to go into effect July 1, 2022, a state judge temporarily blocked the ban on June 30, 2022.[319] The lawsuit was initiated by various reproductive health providers who challenged the constitutionality of the ban, arguing that Florida's constitution safeguards the right to an abortion.[320] The judge issued an oral ruling holding that the law was "unconstitutional in that it violates the privacy provision of the Florida Constitution."[321]

In response to that ruling, Governor Desantis vowed that the state would appeal the decision, arguing that the Florida Supreme Court had "previously misinterpreted Florida's right to privacy as including a right to an abortion."[322] DeSantis continued: "We reject this interpretation because the Florida Constitution does not include—and has never included—a right to kill an innocent unborn."[323]

The state's appeal imposed an automatic stay on the temporary injunction granted by the trial judge and allowed Florida's abortion law to remain in effect.[324] On August 24, 2022, an appeals court rejected the temporary injunction and found that the plaintiffs—several abortion clinics and a doctor—did not show "irreparable harm."[325]

2. Texas: Senate Bill 8 and the 2021 Trigger Law

Texas Senate Bill 8 "is only one of multiple laws restricting abortion in Texas, including a ban dating to 1925 and a 2021 'trigger' law"[326] that went into effect August 25, 2022.[327] These laws

319. Anthony Izaguirre, *Judge to Temporarily Block Florida's 15-Week Abortion Ban*, THE ASSOCIATED PRESS (June 30, 2022), https://apnews.com/article/abortion-health-florida-ron-desantis-legislature-7d8d912cf00f13dd1026848ec2041dc3 [https://perma.cc/7KP8-X4P9].

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. Gabriella Borter & Nate Raymond, *Abortion Bans in Florida, Mississippi Allowed to Take Effect*, REUTERS, https://www.reuters.com/legal/litigation/floridas-15-week-abortion-ban-takes-effect-after-brief-injunction-2022-07-05/ [https://perma.cc/253Y-M5P6] (July 5, 2022, 5:19 PM); *Florida Appeals Court Rejects Abortion Law Injunction*, CBS NEWS MIA., https://www.cbsnews.com/miami/news/florida-appeals-court-rejects-abortion-law-injunction/ [https://perma.cc/XC9A-ZBK9] (Aug. 24, 2022, 9:23 PM).

325. *Florida Appeals Court Rejects Abortion Law Injunction*, *supra* note 324.

326. Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022, 5:00 AM), https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law [https://perma.cc/NK8X-84PW].

represent some of the strictest abortion laws in country.[328] Under Senate Bill 8, which predates *Dobbs* and was enacted in September 2021,[329] health providers are required to perform an ultrasound on an individual seeking to obtain an abortion; if "the ultrasound yields a 'fetal heartbeat,' the abortion provider is legally prohibited from performing the requested abortion, subject to minimum fines of $10,000 if they choose to provide regardless."[330] Thus, the bill prohibits abortions after a fetal pulse can be detected, which is at approximately six weeks—a point at which many women are not even aware of their pregnancies.[331] The bill allows for an abortion exception when it is "medically necessary[;]" however, the statute does not clarify what specific circumstances create a medical emergency warranting an abortion.[332] Although the statute recognizes an exception for medical emergencies, it does not allow for exceptions in circumstances when a person is impregnated due to rape or incest.[333]

As with most abortion laws, the bill absolves from liability anyone who seeks or obtains an abortion.[334] Although it precludes private citizens from filing a lawsuit against an individual who seeks an abortion or individuals who have had an abortion in the past, the bill allows for private citizens to file suit against health providers who have performed an abortion procedure or plan to.[335] Additionally, a person can sue any individual who

327. Eleanor Klibanoff, *New Texas Law Increasing Penalties for Abortion Providers Goes into Effect Aug. 25*, THE TEX. TRIB., https://www.texastribune.org/2022/07/26/texas-abortion-ban-dobbs/ [https://perma.cc/ZWB5-3H8K] (July 27, 2022); Veronica Stracqualursi & Tierney Sneed, *Abortion to Be Put Further Out of Reach for Millions of Women as Slate of 'Trigger Bans' Take Effect*, CNN, https://www.cnn.com/2022/08/25/politics/abortion-access-trigger-laws-idaho-tennessee-texas/index.html [https://perma.cc/U84S-YMCE] (Aug. 25, 2022, 7:34 PM).

328. *See supra* note 16 and accompanying text.

329. Press Release, Ken Paxton, Att'y Gen. of Texas, AG Paxton Announces Win on Senate Bill 8 the "Heartbeat Bill" (Mar. 11, 2022), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-win-senate-bill-8-heartbeat-bill [https://perma.cc/VG6Q-76S9].

330. Katrina Morris, Recent Case Development, Whole Woman's Health v. Jackson*: One Texas Law's Procedural Peculiarities and Its Monolithic Threat to Abortion Access*, 48 AM. J.L. & MED. 158, 161–62 (2022).

331. Bowman, *supra* note 326.

332. Morris, *supra* note 330, at 162.

333. Bowman, *supra* note 326.

334. Morris, *supra* note 330, at 162.

335. *Id.* Other heartbeat bills typically charge state officials "with bringing actions against providers who violate these types of abortion laws[;]" however, "S.B. 8's creation of a private right of action is totally unique" because "members of the public . . . are

> knowingly engages in conduct that aids or abets the performance [or] inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed [or induced] in violation of this subchapter [i.e., if the abortion is not performed out of medical necessity], regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter . . . [or who intends to engage in such conduct].[336]

The gravity of this provision has been noted, as it exposes any party "involved in the *process of obtaining* an abortion" to liability.[337] "[A] partner who drives someone to an abortion appointment,"[338] "an employee at an insurance agency who approves coverage for an abortion, [or] a friend who lent an encouraging ear to a pregnant person before they chose to seek an abortion" could be liable under this law.[339]

Additionally, the bill "specifically prohibits two classes of people from bringing actions against S.B. 8 defendants: governmental sovereigns and people who, via rape, incest, or other assault, impregnated the persons upon which the S.B. 8 defendant[s] performed the abortion procedure[s]."[340] Finally, the bill also provides a financial incentive for plaintiffs who are successful with their actions—in the event they prevail, a court is required to award, in addition to attorney's fees and costs,

> (1) injunctive relief sufficient to prevent the defendant from violating this subchapter or engaging in acts that aid or abet violations of this subchapter;
> (2) statutory damages in an amount of not less than $10,000 for each abortion that the defendant performed or induced in violation of this subchapter, and for each

charged with bringing actions against providers who violate these types of abortion laws." *Id.* at 162–63.

336. *Id.* at 162 (alterations to original) (quoting TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(2)–(3) (West 2022)).

337. *Id.*

338. *Id.* The author notes how this law could impact an "Uber driver who transports an individual to their abortion appointment." *Id.*

339. *Id.* (alteration to original).

340. *Id.* at 163.

> abortion performed or induced in violation of this subchapter that the defendant aided or abetted . . . .[341]

Senate Bill 8 has been labeled by some as a "vigilante abortion law" or "bounty hunter law" "because the law incentivizes citizens with a cash 'bounty' if they succeed in suing anyone who has helped a person get an illegal abortion."[342] Although many states that have abortion bans in place have not thus far implemented these types of enforcement mechanisms, instead relying on their criminal justice systems for enforcement, other states—including Idaho and Oklahoma—enacted laws similar to Texas' "bounty hunter" type law.[343]

> Texas-style laws remain an appealing strategy in the movement's fight to enforce the bans ". . . because of the limits of criminal law" . . . [which offer] fewer ways to survive court challenges and too much discretion to the more progressive prosecutors who might fail to enforce the law.[344]

Prior to the enactment of Senate Bill 8, the Texas legislature also passed its trigger law, Texas House Bill 1280, in May 2021.[345] The trigger law completely bans abortion and "criminalizes performing an abortion from the moment of fertilization unless the pregnant patient is facing 'a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy.'"[346] Texas's trigger law increased

341. HEALTH & SAFETY § 171.208(b)(1)–(2).

342. Bowman, *supra* note 326.

343. *Id.*

344. *Id.*

345. Julián Aguilar, *Texas 'Trigger Law' to Ban Abortion Will Soon Go into Effect. Here's How It Works*, HOUS. PUB. MEDIA (June 24, 2022, 10:09 AM), https://www.houstonpublicmedia.org/articles/news/texas/2022/06/24/427684/texas-trigger-law-to-ban-abortion-will-soon-go-into-effect-heres-how-it-works/ [https://perma.cc/6LC2-8444]; Shannon Najmadi, *Texas Legislature Passes Bill that Would Outlaw Abortions if* Roe v. Wade *Is Overturned*, TEX. TRIB., https://www.texastribune.org/2021/05/11/texas-legislature-abortion-roe-wade/ [https://perma.cc/KFD9-JPTL] (May 25, 2021).

346. Eleanor Klibanoff, *Texans Who Perform Abortions Now Face up to Life in Prison, $100,000 Fine*, TEX. TRIB. (Aug. 25, 2022, 5:00 AM), https://www.texastribune.org/2022/08/25/texas-trigger-law-abortion/ [https://perma.cc/PCX2-2TWN]; Julián Aguilar & Joseph Leahy, *Texas Republicans' Long-Sought 'Trigger Law' on Abortion Now in Effect*, HOUS. PUB. MEDIA, https://www.houstonpublicmedia.org/articles/news/texas/2022/08/25/431599/texas-republicans-long-sought-trigger-law-on-abortion-now-in effect [https://perma.cc/4G8A-QKD9] (Aug. 25, 2022, 11:56 AM). "The trigger law is basically a complete abortion ban . . . . SB 8 has effectively ended

the penalties that health providers face for performing an abortion which include imprisonment up to life in prison.[347] The law also mandates that the attorney general files "a lawsuit to seek a civil penalty of no less than $100,000 per abortion performed."[348] Additionally, it provides that any "person who knowingly performs, induces, or attempts an abortion" faces a second-degree felony which can be increased to a first-degree felony offense "if the unborn child dies as a result of the offense."[349] As with Senate Bill 8, the trigger law does not provide exceptions for rape or incest.[350]

3. Indiana: Senate Bill 1

Unlike Texas and several other states that implemented trigger laws scheduled to become effective once the Supreme Court overturned *Roe*, Indiana was the first state in the country to pass abortion legislation post-*Dobbs*—essentially banning the procedure.[351] Indiana's ban became effective September 15, 2022, and prohibits abortions in the state except under a few circumstances.[352] Senate Bill 1 eliminates abortion clinics' licensure and only permits abortions in outpatient centers or hospitals.[353] The law also provides that physicians that fail to file the necessary reports outlined in the law or perform abortions in violation of the law, "must" lose their medical license.[354]

Abortions are permissible under the statute "in cases of rape and incest, before 10-weeks post-fertilization; to protect the life and physical health of the mother; and if a fetus is diagnosed with a lethal anomaly."[355] Additionally, "[v]ictims of rape and incest [will] not be required to sign a notarized affidavit attesting to an attack, as previously proposed in the Senate."[356] Despite this concession, "the

abortions after the sixth week of gestation, but [House Bill] 1280 has no gestational age. So, there's no point in pregnancy at which abortion is legal" in Texas. *Id.*

347. Klibanoff, *supra* note 327.
348. *Id.*
349. Aguilar, *supra* note 345 (quoting COMM. ON PUB. HEALTH, BILL ANALYSIS, H. 87-1280, Reg. Sess., at 1 (Tex. 2021)).
350. *Id.*
351. *See* Davis, *supra* note 18.
352. *Id.*
353. Associated Press, *supra* note 18.
354. *Id.*
355. *Id.*
356. *Id.*

law imposes a complicated process for performing abortions under these exceptions."[357]

At one point prior to the passage of Senate Bill1, the Indiana legislature debated a version of the bill that "differentiate[d] between older and younger [minor] rape victims."[358] "Victims older than 16 could get abortions up to eight weeks' gestation and younger victims could receive abortions up to the 12-week point."[359] According to a principle policy associate with the Guttmacher Institute, a research organization that advocates globally for sexual and reproductive health rights, no other state currently has abortion laws that distinguish between different ages of minor rape victims and the timeframe in which they can seek an abortion exception.[360] Although "[t]he rape exception generated hours of debate" among Indiana legislators, with some desiring to remove it completely from the abortion bill, the final bill appears to have struck a middle ground between the proposed eight and twelve week time frames, with rape and incest exceptions being allowed up to ten weeks post-fertilization.[361]

IV. A HISTORY OF RAPE AND INCEST ABORTION EXCEPTIONS

For many years, the national public consensus has been that abortion exceptions should be allowed.[362] Recently, in May 2022, an ABC News/Washington Post poll was published revealing that seventy-nine percent of Americans polled stated that abortion should be legal if the pregnancy resulted from rape or incest.[363]

Although it was more common for states to include exceptions for rape and incest towards the end of the twentieth century, "most of the anti-abortion bills introduced across the country in recent years, [despite public sentiments,] haven't included exceptions for rape or incest."[364] Exceptions for rape and incest originated towards the end

357. Davis, *supra* note 18.
358. Ebert, *supra* note 23.
359. *Id.*
360. *Id.*
361. *Id.*
362. Ashley Lopez, *How the Texas Ban on Most Abortions is Harming Survivors of Rape and Incest*, HOUS. PUB. MEDIA (Nov. 15, 2021, 8:40 AM), https://www.houstonpublicmedia.org/articles/news/politics/2021/11/15/413403/how-the-texas-ban-on-most-abortions-is-harming-survivors-of-rape-and-incest/amp/ [https://perma.cc/FZD9-5E43].
363. Filer, *supra* note 19.
364. *Id.*

of the 1950s at a time when the American Law Institute (ALI), an elite organization comprised of "a nonpartisan group of lawyers, scholars, and judges that proposed legal reforms, considered reforming criminal abortion laws."[365]

> At the time, most states criminalized all abortions unless continuing a pregnancy would threaten a person's life. The ALI proposed a broader group of exceptions: for threats to patient health, certain fetal abnormalities, and rape and incest. The ALI could easily justify most of these exceptions as codifications of best medical practice, but rape and incest were different. There, the ALI suggested, the concern was not physical health but the "anxiety and shame" of people who were pregnant through no will of their own. Allowing abortions for people who had had consensual sex, ALI's leaders suggested, would be "an invitation to promiscuity." But the ALI's framers had no such concerns about victims of incest and sexual assault.[366]

The ALI provisions started being adopted by states during the 1960s and there was large endorsement of exceptions for rape and incest cases.[367] Early abortion opponents criticized these exceptions, urging "that 'real rape' almost never resulted in pregnancy—and that women would lie to take advantage of an exception."[368] One major reason promulgated by opponents for rejecting these exceptions hinged on the belief that recognizing them ran counter to "a fetus [being] a rights-holding person."[369]

The relevance of these provisions dissipated, however, after the *Roe* decision made abortion bans unconstitutional.[370] As strides were made by the anti-abortion movement to erode the reproductive protections enshrined in *Roe*, exceptions for rape and incest continued to be a focus in the ongoing debate on abortion.[371] For example, abortion rights proponents labored to get the exceptions

365. Michele Goodwin & Mary Ziegler, *Whatever Happened to the Exceptions for Rape and Incest?*, THE ATLANTIC (Nov. 29, 2021), https://www.theatlantic.com/ideas/archive/2021/11/abortion-law-exceptions-rape-and-incest/620812/ [https://perma.cc/3TV3-KMLH].

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

included in the Hyde Amendment, a federal law that prohibits the use of Medicaid funds to obtain an abortion.[372]

Not only did these exceptions continue to be a focus in the abortion debate, they were also routinely supported "even among Republicans in deeply conservative states."[373] This was not the sentiment of staunch abortion opponents who were always against the exceptions but merely acquiesced to them for a season.[374]

> [This] was because until recent years, the anti-abortion movement had a plan: to win over as many Americans as possible, to make moderate Republicans comfortable working with them, and to maximize the chances of success before the Supreme Court. Fighting against rape and incest exceptions was not an immediate priority.[375]

Additionally, anti-abortion advocates were aware that these exceptions were seldom utilized by victims of sexual violence.[376] It has been noted, however, that "[s]exual assault and incest were . . . massively underreported [at that time and still are] . . . [with] many [reporting] survivors . . . not [being] believed."[377] Thus, although "[s]exual violence was common, . . . at least officially, few abortions were justified on the basis of rape or incest."[378] Hence, anti-abortion opponents have not previously focused their energies on fighting against these exceptions.[379] However, the tides have currently changed.[380]

Even before the overturning of *Roe,* some abortion rights scholars predicted that this change would happen, asserting that "[w]ith six conservatives—including three Trump nominees—the Court seems poised to roll back abortion rights" and that "[f]ew anti-abortion activists are worried about building broad public support [by yielding to rape and incest exceptions] when they have a Court that looks willing to give them everything."[381] As the *Dobbs* decision reflects, the Mississippi abortion ban upheld as constitutional by the majority,

372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.*

contained no exceptions for rape or incest, which was pointedly highlighted by the dissent.[382]

V. SEXUAL VIOLENCE AND THE ABORTION NEXUS

A. Sexual Violence Defined

Sexual violence includes, but is not limited to: "[r]ape or sexual assault[,] [c]hild sexual assault and incest[,] . . . [and] [s]exual exploitation and trafficking."[383]

> [It] happens in every community and affects people of all genders and ages. Sexual violence is any type of unwanted sexual contact. This includes words and actions of a sexual nature against a person's will and without their consent. A person may use force, threats, manipulation, or coercion to commit sexual violence.[384]

B. Rape, Incest, and the Intersection with Abortion

According to the United States Center for Disease Control and Prevention, "[r]ape-related pregnancy (RRP) is a public health problem where sexual violence (SV) and reproductive health connect."[385] Nearly three million women in the United States have become pregnant after being raped.[386] The prevalence of rape-related pregnancies is similar among different races and ethnicities, including Hispanic, White non-Hispanic, Black non-Hispanic, and other non-Hispanic groups.[387] "[A]lthough rape and incest often are mentioned together in abortion laws, there is little research on incest [specifically], a difficult area to study for reasons that include underreporting."[388] A 2004 study conducted by the Guttmacher

382. *See* Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2344 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

383. Nat'l Sexual Violence Res. Ctr., *About Sexual Assault*, NSVRC, https://www.nsvrc.org/about-sexual-assault [https://perma.cc/C2DR-RZVQ] (last visited Dec. 18, 2022).

384. *Id.*

385. *Understanding Pregnancy Resulting from Rape in the United States*, CDC, https://www.cdc.gov/violenceprevention/sexualviolence/understanding-RRP-inUS.html [https://perma.cc/V2YE-QKT3] (last visited Dec. 18, 2022).

386. *Id.*

387. *Id.*

388. Sue Owen, *Surveys Show Wide Disagreement on Number of Rape Related Pregnancies Per Year*, POLITIFACT (Aug. 15, 2013), https://www.politifact.com/

Institute indicated that one percent of 1,209 respondents who were asked why they were choosing to have an abortion stated that it was due to rape, and 0.5% of respondents indicated that they were having an abortion as a result of incest.[389] Although the numbers of abortions associated with rape or incest were small in this survey, it is likely that the study does not comprehensively reflect the number of victims who have had an abortion following rape or incest circumstances.[390]

According to the Rape, Abuse and Incest National Network "more than 2 out of 3 sexual assaults go unreported."[391] Additionally, the National Sexual Violence Resource Center (NSVRC) has highlighted that victims "may choose not to report to law enforcement *or tell anyone about a victimization* they experienced for many reasons."[392] "Some of the most common [reasons] include: a fear of not being believed[,] being afraid of retaliation[,] shame or fear of being blamed[,] pressure from others[,] distrust towards law enforcement[,] [or] a desire to protect the attacker for other reasons."[393] Thus, based on the findings of the NSVRC and the Rape, Abuse and Incest National Network, it is probable that the low percentages reported in the 2004 study referenced above are more so suggestive of underreporting by victims who have been impregnated as a result of rape or incest and have decided to end their pregnancies for that reason.[394]

1. An Account: Rape and Abortion

Three days after the *Dobbs* decision, the story of a ten-year-old Ohio girl who had been raped and impregnated by her rapist

factchecks/2013/aug/15/wendy-davis/surveys-show-wide-disagreement-number-rape-related/ [https://perma.cc/26S8-9T9X].

389. Lawrence Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 113 (2005), https://www.guttmacher.org/journals/psrh/2005/reasons-us-women-have-abortions-quantitative-and-qualitative-perspectives [https://perma.cc/HCN4-2YD2].

390. *See* Owen, *supra* note 388; *see also* Goodwin & Ziegler, *supra* note 365.

391. Chuck, *supra* note 22; *see also* Haberkorn, *supra* note 20. ("[S]exual assault is notoriously underreported. A 2015 report from the University of Texas at Austin's Institute on Domestic Violence & Sexual Assault estimated that only 9.2% of victims of sexual assault reported the incident to police. The same report estimated that 10% of sexual assaults result in pregnancies.").

392. Nat'l Sexual Violence Res. Ctr., *supra* note 383 (emphasis added).

393. *Id.*

394. *See* Owen, *supra* note 388; Nat'l Sexual Violence Res. Ctr., *supra* note 383; *see also* Godwin & Ziegler, *supra* note 365.

surfaced.[395] The little girl was "six weeks and three days into her pregnancy"[396] and was seeking an abortion but was ineligible to receive one in Ohio because of its six-week "trigger ban" law, which prohibited abortion procedures after six weeks of pregnancy.[397] The Ohio girl's story became international news because she could not receive an abortion due to Ohio's law.[398] An Indianapolis obstetrician-gynecologist, Dr. Caitlin Bernard, reported that she was contacted regarding the little girl's situation by another colleague who was a doctor in Ohio that treats victims of child abuse.[399] The girl traveled to Indiana, and Dr. Bernard ultimately performed the abortion procedure.[400] At the time of the procedure, Indiana did not have any abortion bans or restrictions.[401]

In July 2022, a twenty-seven-year-old man from Columbus, Ohio, Gershon Fuentes, confessed to raping the girl on at least two different occasions, per an Ohio detective.[402] He was charged with two felony counts of rape.[403] Per an affidavit, the little girl identified Fuentes as the person who raped her six days before he was arrested.[404] Although the victim was ten when the abortion took place, the jury indictment indicates that she was nine years old when she was

395. Edward Helmore, *10-Year-Old Rape Victim Forced to Travel from Ohio to Indiana for Abortion*, THE GUARDIAN (July 3, 2022, 1:55 PM), https://www.theguardian.com/us-news/2022/jul/03/ohio-indiana-abortion-rape-victim [https://perma.cc/Y9WR-4BXV].

396. Elizabeth Wolfe et al., *Man Accused of Raping a 10-Year-Old in Ohio Who Then Left State for an Abortion Pleads Not Guilty*, CNN (July 25, 2022, 4:34 PM), https://www.cnn.com/2022/07/25/us/gerson-fuentes-child-rape-abortion-not-guilty-plea/index.html [https://perma.cc/VC2L-3H3M].

397. *Id.*

398. Bethany Bruner et al., *Arrest Made in Rape of Ohio Girl That Led to Indiana Abortion Drawing International Attention*, THE COLUMBUS DISPATCH, https://www.dispatch.com/story/news/2022/07/13/columbus-man-charged-rape-10-year-old-led-abortion-in-indiana/10046625002/ [https://perma.cc/H5RE-TQKS] (July 21, 2022, 1:25 PM).

399. Wolfe et al., *supra* note 396.

400. *See id.*

401. Helmore, *supra* note 395.

402. Wolfe et al., *supra* note 396.

403. Samantha Hendrickson & Andrew Welsh-Huggins, *Man Pleads Not Guilty to Raping Girl, 10, Who Had Abortion*, AP NEWS (July 25, 2022), https://apnews.com/article/abortion-health-arrests-indiana-indianapolis-0c6adcf9f5aa81a60e978d0040993ead [https://perma.cc/4UZH-VEKJ].

404. Wolfe et al., *supra* note 396.

raped.[405] On July 25, 2022, despite confessing to raping the girl, Fuentes pleaded not guilty to the rape charges.[406]

Some have questioned the validity of the little girl's story, including some Republican politicians, anti-abortion supporters, and media outlets.[407] In fact, the Attorney General of Ohio, Dave Yost, publicly challenged the validity of the story, claiming that his office "had not heard 'a whisper' of a report being filed for the 10-year-old victim."[408] In one interview, Yost went on to say that the longer time elapsed without confirmation of the girl's story, made it "more likely that this is a fabrication."[409] Once news of the assailant's arraignment was released, Yost issued a one-line statement: "We rejoice anytime a child rapist is taken off the streets[;]" he later added that he was "absolutely delighted that this monster has been taken off the street. If convicted, he should spend the rest of his life in prison."[410]

President Biden spoke out on the matter and urged Americans to put themselves in the girl's shoes: "'Imagine being that little girl,' Biden said . . . as he decried the high court's decision [in *Dobbs*]. 'I'm serious. Just imagine being that little girl.'"[411] "'She was forced to have to travel out of the state to Indiana to seek to terminate the pregnancy and maybe save her life . . . . Ten years old—10 years old!—raped, six weeks pregnant, already traumatized, [and] was forced to travel to another state.'"[412]

2. An Account: Incest and Abortion

Like the little girl in Ohio, Michele Goodwin, a reproductive rights scholar, was victimized as a child and suffered sexual abuse which caused her to become pregnant when she was only twelve years

405. *Id.*
406. Hendrickson & Welsh-Huggins, *supra* note 403.
407. Bruner et al., *supra* note 398.
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.*
412. Daily News Ed. Bd., *The Girl is Real: President Biden Was Not Fabricating the Heartbreaking, Infuriating Story of a 10-Year-Old Rape Victim Forced to Travel for Her Abortion*, N.Y. DAILY NEWS (July 14, 2022, 4:05 AM), https://www.nydailynews.com/opinion/ny-edit-girl-is-real-abortion-biden-20220714-ktqymbliavahvfgq7l5iowflb4-story.html [https://perma.cc/W4Y6-LW75]. These remarks were made by the President at the signing of an executive order designed to safeguard abortion accessibility after the *Dobbs* decision and numerous "Republican-led" states' implementation of laws banning or stringently/strictly limiting abortions. *See id.*

old.[413] She, however, was a victim of incest and her abuse was at the hands of her father.[414]

> It was the early morning of my 10th birthday the first time that I was raped by my father. It would not be the last. The shock was so severe that I temporarily went blind before I began the fifth grade a few weeks later. By the time the school year began, my father had taken me to see a battery of doctors—a medical explanation would paper over the fact that the trauma caused by his sexual violence had caused my body to shut down.
>
> The physiological suffering that I endured included severe migraines, hair loss and even gray hair—at 10 years old. While other girls may have longed for puberty, I loathed the idea of it. My body became a vessel that was not mine. It had been taken from me. I lived in fear of the night, and the footsteps outside my bedroom door.
>
> I gravitated to closets—I would find the deepest corner, sit with a flashlight, read and rock myself . . . .
>
> . . . .
>
> At age 12, I was pregnant by my father, and I had an abortion. Before we got to the doctor's office, I had no idea that I was pregnant. My father lied about my age and the circumstance of my pregnancy, informing the doctor that I was 15 . . . .
>
> My shame was never about the abortion. I will forever be grateful that my pregnancy was terminated.[415]

Piper Stege Nelson, Chief Public Strategies Officer for SAFE Alliance, an organization that provides assistance to victims of child abuse, sexual assault, and domestic violence, recounts a story of a twelve-year-old incest victim in Texas who, like Goodwin, had been raped on numerous occasions by her father and became pregnant.[416] Nelson stated that the father would never let the little girl leave the house and that she "had no idea about anything about her body. She

413. Haberkorn, *supra* note 20.

414. Michele Goodwin, Opinion, *I Was Raped by My Father. An Abortion Saved My Life*, N.Y. TIMES (Nov. 30, 2021), https://www.nytimes.com/2021/11/30/opinion/abortion-texas-mississippi-rape.html [https://perma.cc/2UKX-KMRW].

415. *Id.*

416. Lopez, *supra* note 362.

certainly didn't know that she was pregnant."[417] Like this little girl, many individuals are not aware that they are pregnant until six weeks have passed, which

> is a particular problem for those who are being repeatedly raped or abused . . . because to cope with the trauma of the abuse, they often grow numb to what's happening to their bodies . . . . "That dissociation can lead to a detachment from reality and the fact that she's pregnant . . . and [thus the victim is] not going to be able to resolve that pregnancy [prior to a six-week timeframe]."[418]

One study performed by the American Journal of Obstetrics and Gynecology speaks directly to this issue and indicates that nearly "a third of adolescent rape victims" who participated in the study "did not discover they were pregnant until they had already entered the second trimester."[419] As many states implement laws banning abortions without exceptions, this reality is deeply concerning because it leaves girls searching for "abortion access in another state" or forces them to "carry a pregnancy if impregnated by an abuser."[420]

C. Sex Trafficking and the Intersection with Abortion

As with rape and incest, sex trafficking is another form of sexual violence that has definite correlations with abortion.[421] A 2011 to 2012 study, which collected data from over 100 female sex trafficking survivors from across the United States—age fourteen to sixty—revealed that many of these survivors experienced reproductive health issues as sex trafficking victims, including forced or elective abortions.[422] "The extent of reproductive health issues that survivors reported is hardly surprising due to the extreme levels of sexual abuse these women endured."[423] The study revealed that the

417. *Id.*
418. *Id.*
419. Marty Schladen, *DeWine: No Comment on Abortion Ban That Forced a Child to Indiana*, OHIO CAP. J. (July 8, 2022, 4:00 AM), https://ohiocapitaljournal.com/2022/07/08/dewine-no-comment-on-abortion-ban-that-forced-a-child-to-indiana/ [https://perma.cc/TL7T-LV2P].
420. Haberkorn, *supra* note 20.
421. *See generally* Laura J. Lederer & Christopher A. Wetzel, *The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities*, 23 ANNALS HEALTH L. 61 (2014) (correlating sexual violence with abortions).
422. *Id.* at 66.
423. *Id.* at 72.

survivors "reported being used for sex by approximately thirteen buyers per day, with a median response of ten" and some reported "as many as thirty to fifty buyers" on a typical day.[424] The study further revealed that

> [e]ven without accounting for possible underreporting, forty-seven of the sixty-six women (71.2%) who gave an answer for the number of pregnancies they had during trafficking reported at least one pregnancy while being trafficked; fourteen of these (21.2% of respondents) reported five or more pregnancies. . . . Similarly, more than half (55.2%) of the sixty-seven respondents who answered [the question regarding the number of abortions they had] reported at least one abortion, with twenty respondents (29.9%) reporting multiple abortions.[425]

Respondents indicated that they obtained abortions voluntarily and under forced circumstances during their time of captivity, with nearly half of the respondents voluntarily electing to have an abortion.[426] One survivor reported that she had undergone seventeen abortion procedures while she was a victim, some of her choice and others were involuntary.[427]

Thus, this study exemplifies a definitive nexus between sex trafficking and abortion—voluntarily and involuntarily obtained—that cannot be ignored.

VI. THE NEED FOR ABORTION EXCEPTIONS FOR SEXUAL VIOLENCE VICTIMS

Since the Supreme Court's *Dobbs* opinion, many have spoken of the disparate harm that abortion bans will have on victims of sexual violence.[428] For example, recognizing the disparity, "83 elected prosecutors from around the nation [following *Dobbs*] committed to use their well-established discretion and refuse to prosecute those who seek, assist in or provide abortions, calling the criminalization of

424. *Id.*

425. *Id.* at 72–73.

426. *See id.* at 73. The study indicates that eighteen of the thirty-four respondents stated that "one or more of their abortions was at least partly forced." *Id.*

427. *Id.* at 73–74.

428. Press Release, L.A. Cnty. Dist. Att'y's Off., With Roe Overturned, 83 Elected Prosecutors Commit to Not Prosecute Abortions (June 24, 2022), https://da.lacounty.gov/media/news/roe-overturned-83-elected-prosecutors-commit-not-prosecute-abortions [https://perma.cc/TL7T-LV2P].

abortion care 'a mockery of justice.'"[429] The joint statement drafted by the prosecutors explained:

> Abortion bans will . . . disproportionately harm victims of sexual abuse, rape, incest, human trafficking, and domestic violence. Over the past several decades, law enforcement has rightly worked to adopt evidence-based, trauma-informed approaches that recognize that not all victims of such crimes are able or willing to immediately report, and that delays in reporting or a reticence to report are consistent with the experience of trauma. As prosecutors, we also know that the process of reporting can be retraumatizing for many survivors. We are horrified that some states have failed to carve out exceptions for victims of sexual violence and incest in their abortion restrictions; this is unconscionable. And, even where such exceptions do exist, abortion bans still threaten the autonomy, dignity, and safety of survivors, forcing them to choose between reporting their abuse or being connected to their abuser for life.[430]

Moreover, the lack of rape or incest exceptions in states' abortion laws creates "grave physical and psychological implications for sexual abuse survivors who become pregnant."[431] Speaking to this issue of "physical and psychological" harms, Michele Goodwin, founding director of the Center for Biotechnology and Global Health Policy at the University of California, Irvine, has stated:

> "When there are no exceptions for a person who survived rape or incest, it means the state is coercing that person into a pregnancy they don't want[.]" Women and girls who have survived rape or incest have already been through one harm, "but here's the state rubber-stamping a second harm." . . . "One of the key steps of being a survivor is to be able to get your freedom back, to be able to get your autonomy back, to be able to get your decision-making back[.]"[432]

Some Texas social workers also fear that abortion bans like those in Texas, which exclude exceptions for rape and incest, will lead to

429. *Id.*
430. *Id.*
431. Haberkorn, *supra* note 20.
432. *Id.*

further harm being inflicted on sexual assault victims.[433] For example, Monica Faulkner, a social worker and director of the Institute for Child and Family Wellbeing at the University of Texas at Austin, indicates that when sexual assault victims do not have the option to end a pregnancy, their recovery process from the assault will be even more difficult.[434] She further explains that "[t]he impact of finally coming forward and then being told there are no options for you is devastating[.]"[435] Other abortion rights advocates have likewise noted that not having this option, "further tak[es] control and power away from the survivor right at the moment when they need that power and control over their lives to begin healing."[436] Amnesty International has also highlighted that removing a person's option to terminate a pregnancy or "forced pregnancy is 'a serious violation of sexual and reproductive rights and autonomy which can cause severe physical and psychological harms and often has lasting personal, social and economic consequences.'"[437]

Those who provide psychological services to sexual violence victims have also warned of the extreme adverse impact that these victims will suffer after the *Dobbs* decision.[438] As a result of the overturning of *Roe*, "many trauma survivors will be triggered, frightened, and even re-traumatized by being deprived of agency over integral aspects of their lives and wellbeing[, such as exercising their right to terminate a pregnancy]."[439] One psychotherapy professional explains that:

> Traumatic responses often occur when a person is denied agency over an impactful event, life situation, or component of their identity and flourishing. Agency is essential to recovering from trauma because trauma largely involves a profound loss, destabilization, or suppression of agency. Curtailing a trauma survivor's [bodily] agency after the traumatic experience can have harmful effects on their recovery. Overturning Roe sharply limits the agency of those who are [sexual violence survivors] . . . . [In addition to bodily agency,] [t]rauma survivors need to assert agency

433. Lopez, *supra* note 362.
434. *Id.*
435. *Id.*
436. *Id.*
437. Gregory, *supra* note 21.
438. *Id.*
439. *Id.*

> in their relationships . . . . Being forced to give birth will strip survivors of relational agency and could place them in unsafe situations[, leading them] to stay with abusive partners because they are forced to carry a pregnancy to term; and even if [they] leave their abusive relationships, giving birth to a child could nevertheless conscript many of them to frequent contact with their abusers for many years to come.[440]

Thus, because of the severe psychological and physical harms that sexual violence survivors will experience as a result of not being able to terminate a pregnancy resulting from sexual abuse, all states should allow abortion exceptions to promote the overall healing and safety of these victims and prevent further revictimization.

VII. THE NEED FOR LESS ONEROUS "QUALIFYING" REQUIREMENTS FOR ABORTION EXCEPTIONS

As previously discussed, as of August 1, 2022, Georgia, Idaho, Indiana, North Dakota, South Carolina, Utah, and Wyoming have laws that explicitly prescribe abortion exceptions for rape and incest victims.[441] Additionally, Mississippi's abortion law does not specifically identify incest victims in the statute; however, Mississippi leaders have indicated that incest victims are eligible for exemption from the state's abortion ban.[442]

Although these states allow for exceptions, there are differing requirements that the rape or incest victim must meet.[443] For example, in Mississippi, the relevant portion of the current statute[444] related to abortion exceptions reads:

> (2) No abortion shall be performed or induced in the State of Mississippi, except in the case where necessary for the preservation of the mother's life or where the pregnancy was caused by rape.
> (3) For the purposes of this section, *rape shall be an exception to the prohibition for an abortion only if a*

440. *Id.*
441. Jacobson, *supra* note 14.
442. Mordowanec, *supra* note 300.
443. *See* Chuck, *supra* note 22.
444. The Mississippi ban at issue in the *Dobbs* opinion did not contain any abortion exceptions for rape. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2344 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

> *formal charge of rape has been filed with an appropriate law enforcement official*.[445]

Similar to Mississippi's requirement, in Utah, sexual assault victims must file a police report in order to be "eligible" for the exception.[446] Some legal scholars have stated that requirements such as these can present serious issues since, as previously noted, studies show that the majority of sexual assaults go unreported.[447] Professor Grace Howard, a professor of justice studies who examines the "criminalization of pregnancy" and is also a survivor of sexual violence, has found that the reasons victims do not report their assaults "range from self-blame to worrying about not being believed—a fear that often becomes reality when people speak up."[448] She describes the act of reporting as a "second round" of trauma and "fear[s] that [these reporting requirements] will push people away from exercising that legal loophole that would allow a rape victim to receive this form of care."[449] Additionally, she notes that when victims have to travel to another state because these exceptions do not exist in their state, they are faced with added burdens, including having to afford travel costs to obtain the procedure.[450]

Individuals seeking exceptions because they are victims of incest also have steep hurdles to overcome.[451] Often, incest victims are minors, and the majority of states mandate some level of parental involvement when a minor seeks to have an abortion.[452] The requirements regarding the level of parental involvement, however, vary from state to state.[453] For example, in Alabama, parents are required to consent to a minor having an abortion in order for the procedure to be done.[454] Conversely, in other states, consent is not required, but parents must receive notification of the abortion.[455] While there are states that allow minors to obtain a "judicial bypass," which allows them to petition a judge to present proof of their ability

445. MISS. CODE ANN. § 41-41-45 (West 2022) (emphasis added).
446. Chuck, *supra* note 22.
447. *Id.*
448. *Id.*
449. *Id.*
450. *Id.*
451. *Id.*
452. *Id.*
453. *Id.*
454. *Id.*
455. *Id.*

to make decisions regarding obtaining an abortion absent parent involvement, the bypass process can be problematic as well because a "child that has been subjected to something so incredibly horrific now must find a way to make herself to a courthouse."[456]

Accordingly, even states that allow for rape and incest exceptions should consider the hurdles that they require sexual violence victims to overcome because these requirements, in many cases, are so onerous and complicated that they can lead to secondary victimization and serve as a roadblock to accessing the abortion care that these victims need.

VIII. BIAS AGAINST SEX TRAFFICKING VICTIMS REFLECTED IN ABORTION EXCEPTIONS

Although eight states have recognized abortion exceptions for rape and incest, it appears that very few have even debated allowing abortion exceptions for sex trafficking victims.[457] Yet, as previously noted, victims of sex trafficking are victims of sexual violence like victims of rape and incest.[458] Perhaps the reason why sex trafficking victims are not included with rape and incest victims in abortion ban exceptions is because, sadly, they are not viewed as "victims" by some. Instead, some individuals associate sex trafficking victims more with prostitution which has been defined as the "*voluntary* act of engaging in sex work performance for monetary compensation."[459]

Prostitution has been deemed by some to be a "victimless crime" that "[is] not equated with sexual exploitation because the act [is] voluntary."[460] Additionally, it has been noted that the "'victimless' label [has been attached to prostitution] due to the fact that many believe[] that the women engaging in sex acts [are] doing so voluntarily and that because they [are] receiving compensation, both parties [are] satisfied."[461] According to the Human Rights Watch, prostitution or "[s]ex work is the consensual exchange of sex between adults [whereas] [h]uman trafficking and sexual exploitation of children are separate issues."[462]

456. *Id.*
457. *See* sources cited *supra* note 23.
458. *See* Nat'l Sexual Violence Res. Ctr., *supra* note 383.
459. Browder, *supra* note 24, at 18 (emphasis added).
460. *Id.* at 18–19.
461. *Id.* at 18.
462. *Why Sex Work Should Be Decriminalized*, HUM. RTS. WATCH (Aug. 7, 2019, 3:31 AM), https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized [https://perma.cc/BFJ4-WU96].

Under the Trafficking Victims Protection Act of 2000 (TVPA), severe human trafficking includes "sex trafficking in which a commercial sex act is induced by force, fraud, or in coercion, or in which the person induced to perform such act has not attained 18 years of age."[463]

> Thus, under federal law, anyone eighteen years of age or older who is induced to engage in a commercial sex act through force, fraud or coercion is considered a victim of sex trafficking, while a minor who performs a commercial sex act is a victim of sex trafficking, regardless of whether force, fraud or coercion was used. A "commercial sex act" involves the trading of something of value for "any sexual service."[464]

Despite the reality that traffickers use manipulative tactics and abuse—physical and psychological—to control their victims, "victims of sex trafficking are often viewed as willful participants in prostitution," according to the National Center for Victims of Crime (NCVC).[465]

> A key element in understanding the difference between sex trafficking and prostitution is consent. Prostitution is usually classified as willful and the person is usually doing so under their own accord. Sex trafficking happens when the victim is forced against their will into sexual servitude. Many sex trafficking victims give their consent and seem as though they are willfully engaging in prostitution but their consent was obtained through force, fraud, or coercion. Traffickers use an abundance of different tactics to force or coerce their victims.[466]

463. 22 U.S.C. § 7102(11)(A).

464. Lori Nazry Ross, *See No Evil: A Look at Florida's Legislative Response to Holding Hotels Civilly Liable for "Turning a Blind Eye" to the Sex Trafficking Monster Hiding Behind Closed Doors*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 375, 383 (2020).

465. Stephanie Mahoney, *Human Trafficking: An Overview of Sex Trafficking*, NAT'L CTR. FOR VICTIMS OF CRIME, https://www.ncvctta.org/post/human-trafficking-an-overview-of-sex-trafficking [https://perma.cc/KC85-4WT3] (July 16, 2020).

466. *Id.*; *see also Sex Workers' Rights Are Human Rights*, AMNESTY INT'L (Aug. 14, 2015), https://www.amnesty.org/en/latest/news/2015/08/sex-workers-rights-are-human-rights/ [https://perma.cc/8JVG-5D8T] ("Trafficking is an abhorrent abuse of human rights and must be criminalized as a matter of international law. We do not consider a

In one 2018 study designed to examine the public's perception of domestic sex trafficking, "[s]ex trafficking victims were conceptualized as anyone who had been forced, deceived, or coerced into sexual exploitation"[467] and prostitutes as individuals who "voluntary[ily] engage[d] in sex work performance for monetary compensation."[468] The study specifically focused on the state of Tennessee and was comprised of a thirty-one question survey which "included questions about respondents' demographics and perceptions of domestic sex trafficking, prostitution, and victims of sex trafficking."[469] There were 195 respondents in the study—105 females and 88 males—and they were all college students attending East Tennessee State University.[470]

> [T]he majority [of the respondents were] lower level (freshman and sophomore) students (51.1%) majoring in Criminal Justice (65.1%)[,] . . . were between the ages of 18 and 21 (83.6%), had resided in Tennessee for more than 15 years (62.6%), were Caucasian (79%), Christian (75.9%), single (97.9%), and had no children (93.8%).[471]

Seventy-three of the respondents identified as Republicans, fifty-three as Democrat, sixty-two as Independent, and seven did not identify their political affiliation.[472] The survey revealed that:

> Among the students in the sample, 75% . . . of males agreed that adults involved in sex trafficking are prostitutes compared to 65.7% . . . of females. In addition, 69.9% . . . of all students agreed that adults involved in sex trafficking are perceived to be prostitutes. . . . Students were more likely to perceive minors as victims of sex trafficking in comparison to adults. Therefore, the age of consent influenced student's perceptions. Thus, students did not account for the factors of force, fraud, and coercion and believed that because adults are legally capable to consent to sexual activity, they were not victims of sex trafficking. . . . Overall, despite political affiliation, the majority of students had a misconstrued

trafficked women who is forced to sell sex to be a 'sex worker'. She is a trafficked woman and deserves protection as such.").

467. Browder, *supra* note 24, at 37.
468. *Id.* at 18.
469. *Id.* at 34, 43.
470. *Id.* at 52.
471. *Id.* at 52–53.
472. *Id.* at 54.

> perception of sex trafficking victims because they did not view individuals in sex trafficking as victims.[473]

Although this study is not national in scope, it nevertheless provides tangible evidence and further support for the National Center for Victims of Crime's finding that sex trafficking victims are often misperceived as individuals who are "willful participants in prostitution."[474]

Since legislation is influenced by public opinion,[475] this misperception of trafficking victims as voluntary participants may be one reason why many jurisdictions have not specifically identified sex trafficking victims, along with incest and rape victims, as part of their abortion ban exceptions. Arguably, a state's lack of identification of trafficking victims in its abortion exceptions could be due to an unstated "intention" to classify them as rape victims under existing exceptions. However, if that is the case, that intention must be made clear in order to adequately apprise sex trafficking victims of their rights under the law.

The ambivalence regarding whether rape exceptions apply to sex trafficking victims was recently highlighted by one media outlet's attempt to get answers on Georgia's ambiguous abortion law which became effective post-*Dobbs*.[476] One of the "many unknowns" raised regarding Georgia's abortion statutes was whether "human trafficking [is] considered rape for the purposes of the new law?"[477] Unsuccessful in securing a clear answer to this question, the outlet explained that many Georgia Republican leaders, such as House

473. *Id.* at 55, 67.

474. Mahoney, *supra* note 465.

475. Browder, *supra* note 24, at 38 (acknowledging the importance of assessing the public's perception of sex trafficking victims "because public opinion directly affects how victims are treated upon disclosure and government policy"); *see also* Kennedy Holmes, *Shining Another Light on Spousal Rape Exemptions: Spousal Sexual Violence Laws in the #MeToo Era*, 11 U.C. IRVINE L. REV. 1213, 1237 (2021) (noting how public opinion has impacted legislation related to spousal exemptions in cases of sexual violence between spouses); Lane K. Bogard, *An Exploration of How Laws Tend to Maintain the Oppression of Women and Animals*, 38 WHITTIER L. REV. 1, 10 (2017) ("[P]ublic opinion can influence our laws."); Joel Jay Finer, *Gay and Lesbian Applicants to the Bar: Even Lord Devlin Could Not Defend Exclusion, Circa 2000*, 10 COLUM. J. GENDER & L. 231, 243 (2001) ("Changes in the law both reflect and influence public opinions and attitudes.").

476. Murphy, *supra* note 25.

477. *Id.*

Speaker David Ralston and State Representative Ed Setzler, who authored the legislation, were mute on the issue.[478]

According to the outlet, Republican leaders were unable to "say whether Georgia law specifies that girls and women involved in trafficking are technically rape victims and thus allowed to seek an abortion if they somehow manage to escape and file a police report to take to a doctor."[479] Additionally, in seeking clarity from the Georgia Attorney General's Office about whether rape exceptions applied to trafficking victims, a spokesperson for the office provided a cryptic statement that, "while rape is an exception, '[a]ny interpretation of the law falls within the judicial branch and any modification to the LIFE Act [(Georgia's abortion law)] would be at the discretion of the legislative branch."[480]

Hence, in light of this confusion, it is imperative that states providing exceptions: (1) clearly state their intention to include trafficking victims as individuals "covered" under existing rape exceptions, or (2) specifically prescribe in the legislation sex trafficking as an abortion exception basis. Sex trafficking victims and Americans in general should not be left to wonder, as is currently the case.

IX. THE IMPORTANCE OF ABORTION EXCEPTIONS FOR TRAFFICKING VICTIMS

Some state legislatures and their respective political leaders have made it clear that trafficking victims will be subject to their abortion bans.[481] Most notably, the Florida legislature strongly debated this issue and despite the impassioned appeals of Democrat legislators explaining the severe harm and injustices that would be inflicted on sexual violence victims if no exceptions were allowed, ultimately passed an abortion ban that included no exceptions for victims of rape, incest, or sex trafficking.[482]

Speaking specifically about why she did not support an exemption to Florida's abortion ban for sex trafficking victims, Republican Senator Ileana Garcia stated in a public meeting:

> When the girl or the woman gets pregnant, and they can't make her get an abortion, or she doesn't want to get an abortion, or they can't get her to a place to get an abortion,

478. *Id.*
479. *Id.*
480. *Id.*
481. *See* Contorno, *supra* note 17.
482. *Id.*

> they don't use her anymore . . . . So, they release her from the human trafficking ring. That is why we went to that point.[483]

Senator Garcia's remarks were strongly rebuked by Democrat State Representative Michael Grieco who stated that "[c]laiming that someone should be forced to carry a child to term because they would be less marketable as a 'commodity' for their pimp is insane."[484]

Similar to Florida, the Missouri legislature also hotly debated the issue of whether sex trafficking victims, and sexual violence victims in general, would be allowed an abortion exception under its abortion ban.[485] In 2019, the Missouri legislature passed a bill that banned abortions after eight weeks of pregnancy, absent a medical emergency necessitating an abortion to prevent serious harm or death to the mother.[486] House Bill 126 did not include any abortion exceptions for cases of rape, incest, or human trafficking.[487] This trigger law went into effect following *Dobbs*.[488] Prior to the bill's passage, Missouri Democrats and Republicans engaged in fervent debate, "with Democrats—at times yelling and at other moments sobbing—attempting to persuade the body to reject the measure."[489] One Democrat representative argued that the law was "barbaric," extending more rights to rapists versus the mother carrying child.[490] Another Democrat representative critiqued the lack of exceptions in the bill, including the lack of an exception for sex trafficking victims, by stating that the bill "is not about pro-life; it is about anti-choice . . . [a]nytime we are so disrespectful and immoral that we would force a woman to bring to life a child that is the result of rape, an incest or sex trafficking, we are not thinking about life."[491]

Others also share a different perspective than Florida Senator Garicia's views regarding the impact that abortion bans will have on

483. Andrea Salcedo, *Florida Lawmaker Says Abortion Bans Help Sex-Trafficking Victims Escape*, WASH. POST (May 3, 2022), https://www.washingtonpost.com/nation/2022/05/03/florida-senator-abortion-sex-trafficking/ [https://perma.cc/R75N-5PVV].

484. *Id.*

485. *See* Allyn, *supra* note 23.

486. *Id.*

487. *Id.*

488. *See* Nash & Guarnieri, *supra* note 293.

489. Allyn, *supra* note 23.

490. *Id.*

491. *Id.*

sex trafficking victims.[492] For example, since *Dobbs*, South Carolina enacted a ban on abortions after six weeks that allows exceptions for rape and incest but not sex trafficking.[493] Vicki Ringer, Director of Public Affairs for Planned Parenthood South Atlantic, points out the difficulties that victims of sexual assault and trafficking face and the barrage of questions that have arisen for them since the overturning of *Roe*.[494] She warns that "[trafficking victims] will probably be subjected to more violence, because they are no longer making money for their captors."[495] Tricia Ravenhorst, General Counsel and Director of Systems Advocacy for the South Carolina Coalition Against Domestic Violence and Sexual Assault, also sheds light on the potential dangers these victims face and indicates that "[t]he very nature of the violence itself may result in an unwanted pregnancy . . . [which] may escalate the violence within the relationship with an intimate partner or a trafficker."[496]

Caitlin Macias, Chair of the World Without Exploitation Youth Coalition, a movement that focuses on eliminating commercial sexual exploitation, posits that banning "and restricting safe abortions will further marginalize and entrap sex-trafficking survivors . . . [and] cause[s] some trafficking victims to die, and others to be further victimized."[497] In countering Florida Senator Illeana Garcia's argument that abortion bans will help sex trafficking victims be released from their trafficker, Macias says that the exact opposite will occur:[498]

> The truth is abortion bans will not help victims escape; . . . [t]he fact is that the young children of sex-trafficking victims are often used as leverage by traffickers to force

492. *See, e.g.*, Meyers, *supra* note 302; *see also* Emma Chong, *Does Overturning* Roe v. Wade *Affect Human Trafficking*, UNITED AGAINST HUM. TRAFFICKING (June 27, 2022), https://uaht.org/does-overturning-roe-v-wade-impact-human-trafficking/ [https://perma.cc/7RAH-NQJ3].

493. Meyers, *supra* note 302; Collins, *supra* note 302 (noting that the six-week ban has been temporarily suspended).

494. *See* Meyers, *supra* note 302.

495. *Id.*

496. *Id.*

497. Caitlen Macias, Opinion, *Overturning* Roe *Puts Florida's Sex-Trafficking Survivors at Risk*, HERALD-TRIBUNE (July 25, 2022, 6:11 AM), https://www.heraldtribune.com/story/opinion/columns/guest/2022/07/25/florida-must-not-turn-its-back-sex-trafficking-survivors/10122249002/ [https://perma.cc/H85E-VRR8].

498. *Id.*

> women to stay in "the life," and to further restrict their ability to exit the sex trade.[499]

Moreover, according to United Against Human Trafficking, an organization whose mission is to eradicate trafficking through exploitation prevention, community education efforts, and the provision of resources to empower trafficking survivors,[500] abortion bans do "not help women, families, children, or the community. [They] increase[ ] vulnerability and desperation. *And [they] help[ ] perpetuate human trafficking*."[501]

> Traffickers can use pregnancy and childbirth to keep victims under their control. The trafficked individual might feel obligated to stay in a toxic situation to ensure she has the resources she needs or for the sake of the child "having two parents." If the trafficker is the biological father and the victim flees exploitation with the child, the survivor is legally tied to the person exploiting her. Control is the weapon traffickers wield—and what better way to control a woman than to force her to carry, birth, and raise a child?[502]

Thus, it is critical that state legislatures include sex trafficking victims within their abortion exceptions in order to help deter further entrapment and the risk of increased violence against them by their captors.

X. CONCLUSION

All states imposing abortion bans should afford exceptions to victims of sexual violence, allowing them to terminate pregnancies resulting from their sexual abuse.[503] Doing so will help to prevent further victimization, reinforce self-autonomy, and promote healing and safety for sexual violence victims.[504] Additionally, for states that currently have abortion exceptions in place for rape and incest victims, measures should be implemented to eliminate the overly burdensome requirements that must be met in order for victims to

499. *Id.*
500. *About*, UNITED AGAINST HUM. TRAFFICKING, https://uaht.org/about/ [https://perma.cc/7GNH-LXMM] (last visited Dec. 18, 2022).
501. Chong, *supra* note 492.
502. *Id.*
503. *See supra* Part VI.
504. *See supra* Part VI.

qualify and be able to utilize an exception.[505] Further, it is vitally important that states providing abortion exceptions clearly indicate that these exceptions apply to sex trafficking victims, which is currently unclear. This ambivalence suggests a bias in abortion laws against sex trafficking victims, which should be corrected, as they are victims of sexual violence also and deserve to exercise their rights under an exception if they so choose.[506] Precluding sex trafficking victims from being able to elect to terminate a pregnancy will heighten their risk of suffering greater violence at the hands of their traffickers.[507]

505. *See supra* Part VII.
506. *See supra* Part VIII.
507. *See supra* Part IX.