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BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

“A Post-Roe America: The Legal Consequences of the *Dobbs* Decision”

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Chairman Durbin, Ranking Member Grassley, and Members of the Senate Committee on the Judiciary, thank you for the opportunity to testify before you today. My name is Khiara M. Bridges, and I am a Professor of Law at the University of California, Berkeley, School of Law, where I teach Criminal Law, Family Law, and Reproductive Rights and Justice. I also serve as the Faculty Director of the Berkeley Center on Reproductive Rights and Justice. I am here today to explain how the U.S. Supreme Court’s radical decision in *Dobbs v. Jackson Women’s Health Organization* to take away constitutional protection for reproductive freedom inflicts a racial injury.

In *Dobbs v. Jackson Women’s Health Organization*, the Court upheld Mississippi’s ban on abortions after fifteen weeks of pregnancy and, in the process, overturned *Roe v. Wade*.¹ This radical decision to take away federal constitutional protection for the right to abortion reverses 50 years of the Supreme Court’s precedent. Justice Alito, writing for a five-person majority, argued that *Roe* was “egregiously wrong” and being “egregiously wrong,” the Court was not bound by *stare decisis* to respect it as precedent.² Chief Justice Roberts concurred in the judgment, contending that the Court should go no further than to discard the viability line and permit states to proscribe abortion at the moment that the pregnant person has had a “reasonable opportunity” to terminate the pregnancy—which, in Chief Justice Roberts view, always occurs by the fifteenth week of pregnancy in nonexceptional cases.³

¹ In their petition for certiorari, petitioners asked the Court to overrule *Roe* and *Casey* only to the extent that those decisions prohibited states from banning abortion prior to viability. Petition for Writ of Certiorari at 15, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. June 24, 2022). However, in their brief on the merits, petitioners asked the Court to reverse *Roe* altogether. Brief for Petitioner, *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392 (U.S. June 24, 2022) We can explain the evolution of the petitioners’ request from an evisceration of *Roe* (through an elimination of the viability line) to the eradication of *Roe* (through its complete overruling) in terms of a change in the Court’s personnel: In the time separating the filing of the petition of certiorari and the filing of the brief on the merits, Justice Ruth Bader Ginsburg had died, and the Senate had confirmed Justice Amy Coney Barrett as her replacement. See Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020), <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court>.

² *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, slip op. at 6, 70 (U.S. June 24, 2022).

³ *Id.* at 1 (Roberts, C.J., concurring).

The Court’s decision will likely lead to half of U.S. states immediately taking action to ban abortion outright, forcing people to travel hundreds if not thousands of miles to access abortion care far from their communities or to carry pregnancies to term against their will.⁴ It is impossible to capture the level of harm and chaos that will ensue in the coming weeks and months. The inability to make decisions about one’s bodily autonomy impacts every aspect of a person’s life—from their health to their economic stability and their ability to care for their families. Further, the harms of the Court’s decision will fall hardest on people who are already vulnerable—Black, Indigenous, and other people of color, people with disabilities, young people, LGBTQI+ people, and others whose access to abortion is additionally frustrated by structural inequities in access to health care.

I. The Decision of the Majority Opinion to Privilege the Nation’s “History and Tradition” in 1868, When People with the Capacity for Pregnancy Were Not Part of the Body Politic, Was an Exercise of Power to Support the Desired Outcome of Overturning *Roe*.

Dobbs declares that *Roe* erred when it interpreted the Fourteenth Amendment’s Due Process Clause to protect a right to terminate a pre-viability pregnancy insofar as that clause only protects rights that are “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty.”⁵ For the *Dobbs* majority, the country’s laws in 1868—the year that the Fourteenth Amendment was ratified—determine whether abortion rights can be so characterized.⁶ After canvassing abortion regulations in 1868, the majority concludes that abortion rights are not part of the nation’s “history and tradition,” as “[u]ntil the latter part of the 20th century, such a right was entirely unknown in American law.”⁷ Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy.⁸

The painfully obvious point to make is that people with the capacity for pregnancy⁹ were not part of the body politic during the period of the nation’s history that the majority believes is decisive

⁴ *What If Roe Fell?*, CTR. FOR REPRO. RIGHTS, <https://reproductiverights.org/maps/what-if-ro-fell/>.

⁵ *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, slip op. at 5.

⁶ *See id.* at 36.

⁷ *Id.* at 5.

⁸ *See id.* at 23 (observing that “[b]y 1868, . . . 23 out of 37 [states] had enacted statutes making abortion a crime even if it was performed before quickening”).

⁹ In recognition of the fact that cis women are not the only people who can become pregnant, this testimony uses the language of “people with the capacity for pregnancy” or similar phrases so as to avoid erasing trans men and nonbinary people from the population of people affected by pregnancy regulations. *See* Sachiko Ragosta, *Abortion Care Is Not Just for Cis Women*, MS. MAGAZINE (Mar. 11, 2021), <https://msmagazine.com/2021/03/11/abortion-reproductive-health-cisgender-women-trans-men-transgender-nonbinary/>. When referring to historical periods during which “women,” in particular, were denied rights vis-a-vis “men,” this testimony uses the language of “women.”

of the constitutional inquiry. Women could not vote in the country for another half a century after 1868.¹⁰

Because women could not participate in the democratic process, one could reasonably assume that their interests were not reflected in *any* of the nation's laws, including the criminal laws that the *Dobbs* majority reads as foreclosing a constitutional right to terminate a pregnancy. Thus, the majority's choice to privilege the year 1868 and to attempt to divine the meaning of the Constitution by looking at the nation's practices during that time is a choice to privilege an era characterized by the formal exclusion of people with the capacity for pregnancy.

When one settles on 1868 as the relevant year for the purpose of interpreting what the Constitution requires vis-à-vis people capable of pregnancy, one has overdetermined the inquiry. Indeed, a decision to privilege any historical moment prior to the era in which social movements challenged traditional gender norms is a decision to read reproductive rights and other gender rights out of the Constitution.

It is worth emphasizing that Justice Alito (and four other Justices) *decided* to privilege the year 1868 when interpreting the Constitution with respect to abortion rights. Justice Alito could have decided not to engage in an historical inquiry at all. He has done it before. In his dissent in *Fisher II*, in which the Court upheld the constitutionality of Texas's facially race-conscious admissions program, Justice Alito (and Justices Roberts and Thomas, who joined the dissenting opinion) did not look to what was happening in the country in 1868 to divine the meaning of the Equal Protection Clause and to determine whether affirmative action programs are consistent with it.¹¹ In fact, the opinion engages in no investigation of history whatsoever. As Justice Alito makes a choice to eschew an historical inquiry in the context of affirmative action—likely because that inquiry will lead to results that he does not like—he makes a choice to embrace an historical inquiry in the context of abortion. This is true because the inquiry leads him to the outcome—the reversal of *Roe*—that he so desperately wanted.

We should also observe that the majority opinion in *Dobbs* is not the first to interrogate the history of abortion. The majority opinion in *Roe*—which seven Justices joined—engages in an in-depth, lengthy investigation into the history of thought around fetal life and abortion practices, ultimately finding that this history supports the existence of a fundamental right to terminate a pre-viability pregnancy.¹² Likewise, the dissent in *Dobbs* observes that abortion was legal (at least for people who were not enslaved) at least until the middle of the second trimester and long

¹⁰ See U.S. Const. amend. XIX.

¹¹ See *Fisher v. University of Texas at Austin (Fisher II)*, 579 U.S. 365 (2016) (Alito, J., dissenting).

¹² See *Roe v. Wade*, 410 U.S. 113, 129–152 (1973).

after the founding, before the spate of Victorian Era criminal laws that Justice Alito cites.¹³ The decision to elevate partial moments of history is not the apolitical exercise that the *Dobbs* majority pretends it to be. Instead, it is an exercise that is fraught with values, convictions, preferences, and, perhaps most of all, power.

II. The Majority Opinion’s Method of Constitutional Interpretation Threatens Liberty Rights People Rely on to Make Deeply Personal Decisions About Their Lives, Relationships, and Families.

The Supreme Court bolstered the liberty doctrine in *Roe v. Wade* and *Planned Parenthood v. Casey*, firmly grounding the right to abortion in the liberty to make fundamental decisions about personal autonomy and bodily integrity. This liberty includes the rights to family and child-bearing recognized in *Meyer v. Nebraska* (1923) and strengthened in *Moore v. City of East Cleveland* (1977), the right to use contraception recognized in *Griswold v. Connecticut* (1965) and in *Carey v. Population Services* (1977), and the right to marry in *Loving v. Virginia* (1967), which was subsequently extended to same-sex couples in *Obergefell v. Hodges* (2015).

The method of constitutional interpretation that the *Dobbs* majority chooses to employ—interpreting the Constitution to protect only those behaviors and practices that were protected in 1868—does not bode well for the persistence of other fundamental rights that the Court recognized when it had different members. As the dissent puts it, “The majority could write just as long an opinion showing, for example, that until the mid-20th century, there was no support in American law for a constitutional right to obtain contraception.”¹⁴ Likewise, in 1868, there was no support in American law for a constitutional right to engage in consensual sex with an adult of the same sex, nor a constitutional right to marry someone of the same sex. Thus, the *Dobbs* majority’s protestations that its holding does not unsettle *Griswold v. Connecticut*, *Lawrence v. Texas*, and *Obergefell v. Hodges*—as those precedents do not involve the destruction of fetal life—ring a bit hollow.¹⁵ The methodology of constitutional interpretation that the majority

¹³ See *Dobbs*, slip op. at 13 (Breyer, J., dissenting) (“Common-law authorities did not treat abortion as a crime before ‘quickening’—the point where the fetus moved in the womb. And early American law followed the common-law rule.”); Brief for American Historical Ass’n et anno. at 3 (2021) (same; “stricter statutes [were] enacted in the 1840s to 1850,” long after the American founding); James C. Mohr, *Abortion in America* 73 (1978) (“To document fully the pervasiveness of the quickening doctrine in the United States through the 1870s would take scores, if not hundreds, of pages of references. It was simply a fact of American life.”). As one court put it in 1849: “It is not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception, or at some intervening period. *In contemplation of law* life commences at the moment of quickening,” for there is “no precedent, no authority” for treating “the mere procuring of an abortion by the destruction of a *foetus* unquickened, as a crime against the person or against God and religion.” *State v. Cooper*, 22 N.J.L. 52, 55 (N.J. 1849).

¹⁴ *Dobbs*, slip op. at 5 (Breyer, J., dissenting).

¹⁵ *Id.* at 31–32 (claiming that the reversal of *Roe* “does not undermine” the substantive due process cases—including *Meyer v. Nebraska* (finding a fundamental right to parent one’s child in the manner that one sees fit), *Griswold v. Connecticut* (finding a fundamental right for the married individual to access contraception), *Eisenstadt v. Baird*

deploys to return the question of abortion’s legality to the states could be just as easily be deployed to do the same with regard to the legality of contraception, same-sex marriage and same-sex sex.¹⁶ We could make the same point about the right to be free from coerced sterilization¹⁷; indeed, when asked the question in 1923, the Court did not believe the Constitution protected such a right.¹⁸

III. The Majority Opinion Erases and Subordinates Pregnant People to the Fetuses They Carry.

Another notable aspect of the majority opinion is that it professes that it embraces no “theory of life.”¹⁹ The majority says that one of the many errors that the *Roe* majority and the *Dobbs* dissenters make is that they adopt the theory that the fetus is *not* a life.²⁰

The opinion undeniably has a theory of life. And this theory is that pregnant people’s plans, wishes, desires, dreams, ambitions, aspirations, and prayers, are not more significant than fetal life. This theory is that pregnant people can be subordinated to the fetuses that they carry.²¹ This is not the absence of a theory. This is not an example of the Court being “scrupulously neutral.”²² There is no neutral position. The Court has taken a side.²³ It has sided with those who believe that it is legitimate to force birth.

(finding a fundamental right for the unmarried individual to access contraception) and *Skinner v. Oklahoma* (suggesting the existence of a fundamental right to be free from compelled sterilization)—on which *Roe* relied); *id.* at 38 (accusing the dissent of “stok[ing] unfounded fear that our decision will imperil” *Griswold, Eisenstadt, Lawrence, and Obergefell*); *id.* at 66 (“[W]e emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”).

¹⁶ Justice Thomas’s concurrence, which continues Thomas’s practice of heavily citing his own prior opinions, pointedly calls for the reversal of all the Court’s substantive due process precedents. *Id.* at 7 (Thomas, J., concurring) (arguing for the elimination of substantive due process “from our jurisprudence at the earliest opportunity”).

¹⁷ See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

¹⁸ See *Buck v. Bell*, 274 U.S. 200 (1927) (finding that the Constitution does not contain a fundamental right to be free from forced sterilization).

¹⁹ *Dobbs*, slip op. at 38 (“Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth.”).

²⁰ *Id.* at 38 (arguing that the dissent would “impose on the people” the theory that the fetus lacks “even the most basic human right—to live—at least until an arbitrary point in pregnancy has passed.”).

²¹ The *Dobbs* dissenters would phrase the majority’s theory in terms of the rightlessness of women. *Id.* at 2 (Breyer, J., dissenting) (arguing that the majority proposes that “from the very moment of fertilization, a woman has no rights to speak of”).

²² *Id.* at 3 (Kavanaugh, J., concurring).

²³ *Id.* at 21 (Breyer, J., dissenting) (arguing that with the *Dobbs* decision, the Court is “taking sides [] against women who wish to exercise the right and for States ... that want to bar them from doing so.”).

It deserves emphasizing that with *Dobbs*, the Court has not at all “g[otten] out of the area” of abortion.²⁴ *Dobbs* declares that the proper standard for reviewing abortion regulations is rational basis review and courts should ask whether a challenged regulation is rationally related to a legitimate governmental interest.²⁵ The legal questions that *Dobbs* leaves open are numerous. The Court will be adjudicating disputes about the legality of abortion regulations for quite some time. *Dobbs* simply ushers in the next stage of adjudication.

IV. The Devastating Harms of the Supreme Court’s Decision Will Fall Hardest on Black People Who Are Systemically Denied Access to Abortion Care and Criminalized by the State for Their Pregnancy Outcomes.

There should be no doubt that the demise of *Roe v. Wade* inflicts a racial injury. This section describes the source and shape of this racial injury with precision.

A. Structural Inequities Black People Face Exacerbate the Harms of Abortion Restrictions

Black people turn to abortion care more frequently than other racial groups.²⁶ Indeed, black people’s abortion rate is three to four times white people’s abortion rate.²⁷ This is a direct result of black people’s higher rate of unintended pregnancy,²⁸ which has several causes. First, the higher rate of unintended pregnancy is a function of the higher rate of poverty among black people.²⁹ Indigent people have higher rates of unintended pregnancy because poverty makes

²⁴ *Planned Parenthood v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting) (arguing that the Court should overrule *Roe* because “[w]e should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.”).

²⁵ *Dobbs*, slip op. at 77.

²⁶ See Dr. Katherine Kortzmit et al., *Abortion Surveillance—United States, 2019*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Nov. 26, 2021), <https://www.cdc.gov/mmwr/volumes/70/ss/ss7009a1.htm>.

²⁷ *Id.* (noting that in 2019, “compared with non-Hispanic white women, abortion rates and ratios were 3.6 and 3.3 times higher among non-Hispanic Black women”).

²⁸ Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States 2008-2011*, 374 NEW ENG. J. MED. 843, 843 (2016), <https://www.nejm.org/doi/full/10.1056/nejmsa1506575> (“At 79 per 1,000, the unintended pregnancy rate for non-Hispanic Black women in 2011 was more than double that of non-Hispanic white women (33 per 1,000).”); Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL’Y REV., 3 (Sept. 2008), https://www.guttmacher.org/sites/default/files/article_files/gpr110302.pdf.

²⁹ See *Poverty Rate by Race/Ethnicity*, KAISER FAMILY FOUND., <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited July 9, 2022); Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States 2008–2011*, 374 NEW ENG. J. MED. 843, 846 (2016), <https://www.nejm.org/doi/full/10.1056/nejmsa1506575> (Low-income women experience unintended pregnancy rates significantly higher than those who are not low-income; among women living below the federal policy line, the unintended pregnancy rate is five times higher than that experienced by higher-income women.); see also *Dobbs*, slip op. at 50 (Breyer, J., dissenting) (noting that “[w]omen living below the federal poverty line experience unintended pregnancies at rates five times higher than higher income women do”).

reproductive healthcare and effective contraception more difficult to access.³⁰ Second, higher rates of unintended pregnancy among black people with the capacity for pregnancy are a function of their decreased ability to control the conditions under which they have sex—their inability to insist upon the use of the contraception to which they have access. Indeed, there is evidence that there are higher rates of intimate partner violence among black women,³¹ a statistic that is a function of the disproportionate burdens of poverty that black people bear.³² Black people with the capacity for pregnancy are also more likely than their nonblack counterparts to experience rape during the course of their lives.³³ Additionally, black people capable of pregnancy are more likely than their nonblack counterparts to experience reproductive coercion, where sexual “partners actively try to impregnate their partner against their wishes, interfere with contraceptive use,” hassle their partner not to use contraception, or sabotage condom usage.³⁴ Higher incidences of intimate partner violence, sexual assault, and reproductive coercion among black people capable of pregnancy undoubtedly contribute to their increased frequency of unintended pregnancy.

Moreover, a frequently cited reason that individuals give for terminating an unintended pregnancy is that they cannot afford to have a child at that time.³⁵ Thus, the unequal burden of poverty that black people bear renders them more likely to face an unintended pregnancy in the first instance and, in the second instance, to lack the funds thought necessary to carry the pregnancy to term and raise the child. Thus, when states are permitted to use the criminal or civil law to make abortion inaccessible, states render unavailable a service upon which black people—for myriad complicated, oftentimes tragic reasons—disparately rely.

Of course, abortion prohibitions are not invariably successful in making the fact of unintended and unwanted pregnancy end in birth, as many people carrying an unwanted pregnancy will be able to circumvent a legal prohibition on abortion. The anti-abortion movement’s end goal has always been to enact a nationwide ban on abortion, and members of Congress have echoed their

³⁰ Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL’Y REV 2, 2-3 (Sept. 2008), https://www.guttmacher.org/sites/default/files/article_files/gpr110302.pdf.

³¹ See ASHA DUMONTHIER ET AL., INST. FOR WOMEN’S POL’Y RSCH., *THE STATUS OF BLACK WOMEN IN THE UNITED STATES* 119 (2017) (noting that while 31.5% of all women experience physical violence by an intimate partner, more than 40% of black women endure such violence).

³² See Carolyn M. West, *Black Women and Intimate Partner Violence: New Directions for Research*, 19 J. INTERPERSONAL VIOLENCE 1487, 1487 (2004) (noting that when controlling for income levels, “racial differences in rates of partner abuse frequently disappear, or become less pronounced”).

³³ See DuMonthier, et al., *supra* note 31, at 120–21.

³⁴ Charvonne N. Holliday et al., *Racial Differences in Pregnancy Intention, Reproductive Coercion, and Partner Violence Among Family Planning Clients: A Qualitative Exploration*, 28 WOMEN’S HEALTH ISSUES 205, 206 (2018).

³⁵ See Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 112, 115 (2005).

clarion call.³⁶ But as long as abortion access remains legal in even a few states, people living in states that are hostile to abortion will travel to a state or jurisdiction where abortion services are still available.³⁷ However, those who are able to avoid abortion restrictions in their states of residence tend to have some degree of class-privilege—a fact that was also true in the pre-*Roe* era.³⁸ The people who can travel out-of-state to obtain abortions are able to absorb the transportation costs. They are able to take paid time off from their jobs or to afford sacrificing the wages they might have earned. They are able to arrange and pay for childcare. In this way, poverty and a lack of resources impose obstacles to the travel that allows for the circumvention of abortion restrictions.³⁹ Because black people are disproportionately impoverished and bereft of resources, they will be able to bypass abortion restriction less frequently than their nonblack counterparts. That is, black people will be forced to carry pregnancies to term and give birth more frequently than people of other races. In this way, the fall of *Roe* inflicts a racial injury.

B. The Intersection of Abortion Access and Black Maternal Health

³⁶ See, e.g., Matt Berg, *Pence: 'We must not rest' until abortion is outlawed in every state*, POLITICO (June 24, 2022), <https://www.politico.com/news/2022/06/24/pence-we-must-not-rest-until-abortion-is-outlawed-in-every-state-00042315>; Kelsey Carolan, *Texas rep 'working on' bill to expand state's abortion law nationwide*, THE HILL (July 8, 2022), <https://thehill.com/homenews/house/3550408-texas-rep-working-on-bill-to-expand-states-abortion-law-nationwide/>; Emily Brooks, *House Republicans weigh national abortion restrictions*, THE HILL (July 7, 2022), <https://thehill.com/homenews/house/3548140-house-republicans-weigh-national-abortion-restrictions/>.

³⁷ After the Supreme Court permitted Texas's SB8 to go into effect in September 2021—effectively ending legal abortions after six weeks of pregnancy in the state—Texans flocked to neighboring states to obtain abortion care. Tierney Sneed, *Texas abortion seekers flooded out-of-state-clinics after six-week ban went into effect, Planned Parenthood records show*, CNN (Feb. 24, 2022, 6:10 PM), <https://www.cnn.com/2022/02/24/politics/abortion-texas-clinics-surge/index.html>. Some abortion clinics in Oklahoma reported a 2500% increase in patients from Texas. *New Planned Parenthood Data Highlight The Far-Reaching Impact of Texas Abortion Ban*, PLANNED PARENTHOOD (Feb. 2, 2022). One abortion clinic in Kansas reported that after SB8 went into effect, half to 75% of its clients came from Texas. Shefali Luthra, *Abortion clinics outside Texas see surge in patients since ban*, USA TODAY (Sept. 22, 2021), <https://www.usatoday.com/story/news/nation/2021/09/22/abortion-clinics-near-texas-flooded-patients-since-states-ban/5799093001/>.

³⁸ David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 834 (1999) (writing that in the days before *Roe*, “there were hundreds upon hundreds of doctors in this country who secretly performed abortions for women whom they knew and who could pay”).

³⁹ *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 3–4 (U.S. June 24, 2022) (Breyer, J., dissenting) (acknowledging that “women lacking financial resources will suffer from” the *Dobbs* decision because they will not be able to afford to travel “to a distant State for a procedure” and naming the lack of “money or childcare or the ability to take time off from work” as restraints on the ability of poor people to “find ways around the State’s assertion of power”).

Poverty is not the only impediment to travel that people face. People with mental or physical disabilities may find travel difficult or unmanageable. Survivors of intimate partner violence may be rendered immobile insofar as they may need to conceal their whereabouts from an abusive partner. Young people may need to hide their destination from a parent. The necessity of crossing an immigration checkpoint may make it impossible for an undocumented person to travel. See Paula Molina Acosta & Emma Flores, *Immigration & Abortion Care: Why Reproductive Rights are Inextricable from Migration*, NAT’L P’SHP FOR WOMEN & FAMILIES (Oct. 1, 2021), <https://www.nationalpartnership.org/our-impact/blog/general/immigration-abortion-care-inextricable-from-migration.html>; NAT’L P’SHP FOR WOMEN & FAMILIES & AUTISTIC SELF ADVOCACY NETWORK, ACCESS, AUTONOMY, AND DIGNITY: ABORTION CARE FOR PEOPLE WITH DISABILITIES (Sept. 2021), <https://www.nationalpartnership.org/our-work/resources/health-care/repro/repro-disability-abortion.pdf>.

Further, when abortion is unavailable and a person is forced to carry a pregnancy to term and give birth, the riskiness of that endeavor varies across states⁴⁰—and across racial groups.⁴¹ In Mississippi, which saw fit to ask the Court to strike down *Roe* and force pregnant people to give birth against their will, black people are more than two-and-a-half times more likely than their white counterparts to die from a pregnancy-related cause.⁴² Nationally, black people are three to four times as likely as their white counterparts to die during pregnancy, childbirth, or the postpartum period.⁴³ In this way, the reversal of *Roe* inflicts a racial injury insofar as it allows states to criminalize a tool that helps black people keep their lives.

C. The Carceral State and the Criminalization of Black People’s Pregnancy Outcomes

Unquestionably, we should expect that some people unable to travel to obtain safe and legal abortions out-of-state will attempt to terminate their pregnancies themselves. The advent of medication-abortion—misoprostol and mifepristone—diminishes the danger involved in terminating one’s own pregnancy. The use of misoprostol and mifepristone as abortifacients is exceedingly safe when the individual ingests the medication at earlier stages of pregnancy.⁴⁴

In contrast to the increased medical safety of self-managed abortion, the legal risk is higher than ever, as there has been a significant development in the U.S. since 1973: the number of people in jails and prisons has grown tremendously. The incarcerated population has *quadrupled* in the last forty years, with close to two million people confined in jails and prisons today.⁴⁵ “The U.S. federal and state governments lock up more people and at higher rates than ...any other government[] in the world, and they do so today more than they did at any other period in U.S.

⁴⁰ See Brief of Respondents at 28, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. June 24, 2022) (noting that while “[c]hildbirth is now 14 times more likely than abortion to result in death ..., [and t]he comparative risk is even higher in Mississippi, where it is about 75 times more dangerous to carry a pregnancy to term than to have an abortion”).

⁴¹ *Id.*

⁴² See Brief of Respondents at 28 n. 8, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. June 24, 2022) (noting that the maternal mortality ratio for black women in Mississippi is 51.9 deaths per 100,000 live births, while the ratio for white women is 18.9 deaths per 100,000 live births).

⁴³ See *Pregnancy Mortality Surveillance System*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 25, 2020), <https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm> (for every 100,000 live births from 2014-2017, 13.4 non-Hispanic white women died of pregnancy-related causes compared to 41.7 non-Hispanic black women). Black people are also twice as likely as white people to suffer severe maternal morbidity, in which “a pregnant or recently postpartum woman faces a life-threatening diagnosis or must undergo a life-saving medical procedure—like a hysterectomy, blood transfusion, or mechanical ventilation—to avoid death.” See Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 NYU L. REV. 1229, 1242–43 (2020).

⁴⁴ See Aziza Ahmed, *Floating Lungs: Forensic Science in Self-Induced Abortion Prosecutions*, 100 B.U. L. REV. 1111, 1123 (2020) (“A medication abortion is safe ...—according to advocates and health professionals—when the abortion is done within legal and medical time limits, provided by the legally required health professional, and done with medication received from a pharmacy.”).

⁴⁵ See Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 12 (2019) (“In the last forty years, the U.S. incarcerated population exploded from about 500,000 to more than two million.”).

history.”⁴⁶ This is to say that the country currently is much more willing than it was in the generations that preceded *Roe* to turn to jails and prisons to address its social problems, real or imagined.

Moreover, there exists precedent for punishing people for poor pregnancy outcomes—a precedent that simply did not exist during the era of criminal abortion laws that preceded *Roe*. In the 1980s, during the crack cocaine scare, states began to use creative interpretations of the criminal law to prosecute black people who used the drug during their pregnancies.⁴⁷ Prosecutors claimed that they sought to punish them for harming, or potentially harming, their babies.⁴⁸ Arrests and prosecutions for substance use during pregnancy continue to the present, many of which target people who have used opioids or methamphetamine while pregnant.⁴⁹ Further, criminal punishment of pregnant people who have suffered poor birth outcomes occur outside of the context of substance use. Prosecutors brought charges against a pregnant woman who fell down steps.⁵⁰ They brought charges against a depressed pregnant woman who attempted suicide.⁵¹ They brought charges against a pregnant woman who suffered a miscarriage after

⁴⁶ *Id.* at 12–13.

⁴⁷ See Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 815–21 (2020). During oral arguments in *Dobbs*, Justice Thomas appeared to raise the question of whether the right to an abortion recognized in *Roe* permits states to punish pregnant people who use controlled substances. Transcript of Oral Argument at 49, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. June 24, 2022).

⁴⁸ Although some of the people prosecuted for cocaine use during pregnancy had suffered poor outcomes, many others had given birth to perfectly healthy babies. Bridges, *supra* note 47, at 818. Thus, injury to the baby could not justify prosecution in the latter set of cases. In the absence of a perceptible injury, only the *risk* of harm could justify punishment. If states felt comfortable punishing people for exposing their fetuses and babies to the *risk* of harm, it seems odd to suppose that they would not feel comfortable punishing people who end fetal life altogether through abortion.

It deserves underscoring that there is little to no evidence that prenatal exposure to cocaine causes permanent injuries to babies. *Id.* Instead, the evidence shows that it is much more likely that the poverty in which the pregnant person lived caused the harm to the fetus. See Susan FitzGerald, “*Crack Baby*” Study Ends with Unexpected but Clear Result, PHILA. INQUIRER (July 21, 2013), https://www.inquirer.com/philly/health/20130721_Crack_baby_study_ends_with_unexpected_but_clear_result.html (quoting neonatologist Hallum Hurt concluding that “[p]overty is a more powerful influence on the outcome of inner-city children than gestational exposure to cocaine . . .”). As I have summarized elsewhere:

The longitudinal studies that have been conducted on children who had been exposed to cocaine in utero show that they do not differ from children who did not sustain in utero exposure to cocaine. These studies establish that while cocaine may have a nominal effect on children exposed to it in utero, poverty, by far, bears the greatest responsibility for infant morbidity and mortality.

Bridges, *supra* note 47, at 818.

⁴⁹ See *id.* at 821–25.

⁵⁰ Iowa Police Almost Prosecute Woman for Her Accidental Fall During Pregnancy . . . Seriously . . . , ACLU ME. (Feb. 11, 2010, 5:04 PM), <https://www.aclumaine.org/en/news/iowapolice-almost-prosecute-woman-her-accidental-fall-during-pregnancyseriously>.

⁵¹ Jessica Mason Pieklo, *Legal Wrap: Finally Some Justice for Bei Bei Shuai*, REWIRE NEWS GRP. (Aug. 6, 2013, 9:14 AM), <https://rewire.news/article/2013/08/06/legal-wrap-finallysome-justice-for-bei-bei-shuai/>.

being shot in the abdomen during an altercation.⁵² They have also brought charges against pregnant people who have suffered *no* adverse outcome: a pregnant woman faced charges for endangering her fetus after she drove her car without wearing a seatbelt and tried to avoid arrest by the police officers who pulled her over.⁵³ This is all to say that if there was ever a period of time when pregnant people were not conceptualized as subjects who ought to be punished for harms, or risks of harms, to their fetuses, that era has passed.

Although a number of abortion rights opponents currently claim to consider the pregnant person who has an abortion to be a victim and the person who performs or facilitates access to the abortion to be the victimizer,⁵⁴ we might be skeptical about the sincerity, or endurance, of this belief in light of our current practice of punishing pregnant people for contributing to, or simply creating the risk of, negative pregnancy outcomes.⁵⁵ Thus, *Roe*'s demise creates circumstances under which black people, who disproportionately rely on abortion services, will be overrepresented among those who are exposed to criminal punishment for attempting to self-manage their abortions.

Importantly, even if black people's abortion rates were on par with the abortion rates of nonblack people, and even if black people attempted to self-manage abortion despite the threat of criminal punishment as frequently as people of other races, we should fully expect that black people will be more frequently arrested, prosecuted, indicted, and convicted for breaking the law; we should also expect them to serve longer sentences when convicted than their nonblack counterparts. We should have this expectation because, as a general matter, black people are more likely than their nonblack counterparts to be arrested, prosecuted, indicted, and convicted for the same conduct, and they serve longer sentences than their nonblack counterparts, even when controlling for relevant factors.⁵⁶

Thus, the size and muscularity of the carceral state—as well as the attention that the carceral state gives to pregnant people who behave in non-normative ways—have increased drastically since the pre-*Roe* era of criminal abortion laws. And so, the fall of *Roe* ushers black people into a

⁵² Holly Yan & Madeline Holcombe, *A Pregnant Woman Shot in the Stomach Is Indicted in Her Unborn Child's Death*, CNN (June 28, 2019, 8:13 PM), <https://www.cnn.com/2019/06/27/us/alabama-pregnant-woman-shot-in-stomach-manslaughter-indictment-trnd/index.html>.

⁵³ See *Deputy: Pregnant Woman Tries to Evade Arrest*, GREENVILLE SUN (Nov. 11, 2014), https://www.greenevillesun.com/xml/nitf/deputy-pregnant-woman-tries-to-evade-arrest/article_%20fec891ba-1860-5cce-9b5d-2ff25df4b236.html.

⁵⁴ See, e.g., Veronica Stracqualursi, *Leading anti-abortion groups urge state lawmakers not to pass bills criminalizing women for abortions*, CNN (May 12, 2022), <https://www.cnn.com/2022/05/12/politics/anti-abortion-groups-letter-criminalizing-women/index.html>.

⁵⁵ See *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 3 (U.S. June 24, 2022) (Breyer, J., dissenting) (observing that states may decide to “criminalize the woman’s conduct too, incarcerating her for daring to seek or obtain an abortion”).

⁵⁶ THE SENTENCING PROJECT, *REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM* (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

regime in which they are likely to more frequently engage in criminalized behavior and in which their racial unprivilege makes them more likely to be swept into the apparatus of the criminal legal system.⁵⁷ In this way, the fall of *Roe* inflicts a racial injury.

V. Conclusion

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* was gravely wrong. One cannot overstate the level of harm and chaos that the decision has already caused people seeking abortion care, providers, and practical support organizations. This harm will continue to worsen in the coming months and years.

The crisis in access to abortion care in the United States highlights the need for a bold, holistic, and intersectional policy response that puts within its range of vision everything from the need for comprehensive paid family and medical leave to laws that tackle the climate crisis and urgently protect the right to vote. This response must address the systemic conditions of inequality that disproportionately affect black people and compound the harms of abortion restrictions. In this critical moment, we need the reproductive justice framework to inform policy making so that we can fight to ensure that people have the necessary economic, social, and political support to control their bodies, including when and whether to have children. The overruling of *Roe v. Wade* inflicts a racial injury and necessitates the exploration of other avenues to ground federal constitutions protections for the right to abortion, including the Thirteenth Amendment and the Fourteenth Amendment's Equal Protection Clause. Until that happens, we are left with the devastating consequences of a politically motivated Supreme Court decision that will affect the health and lives of people across the country and disproportionately impact black women and black people who can become pregnant.

⁵⁷ Relevantly, “the female incarceration rate has grown twice as quickly as the male incarceration rate over the past few decades, and black women are twice as likely as white women to be behind bars.” Roberts, *supra* note 45, at 13. Roberts observes that the U.S. has a history of meting out harsher punishment to black women, writing that “[t]he wildly disparate treatment of white women and black women arrested for similar crimes is mind-boggling: for example, ‘[b]etween 1908 and 1938, only four white women were ever sentenced to the chain gang in Georgia, compared with almost two thousand Black women.’” *Id.* at 32.