



STATE INNOVATION EXCHANGE

**OBSTETRICIANS FOR  
REPRODUCTIVE JUSTICE** 

**RHimpact**  
THE COLLABORATIVE FOR EQUITY AND JUSTICE

**Ipas**

## United States of America

Submission to the Human Rights Committee

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**Amnesty International USA** is a non-governmental, non-profit organization representing the largest grassroots human rights movement in the world, with more than ten million members and supporters worldwide. Amnesty International's mission is to advocate for global compliance with international human rights law, the development of human rights norms, and the effective enjoyment of human rights by all persons. It monitors state compliance with international human rights law and engages in advocacy, litigation, and education to prevent and end human rights violations and to demand justice for those whose rights have been violated.

The **Global Justice Center (GJC)** is an international human rights organization, with consultative status to the United Nations, dedicated to advancing gender equality through the rule of law. GJC combines advocacy with legal analysis, working to ensure equal protection of the law for women and girls.

**Human Rights Watch** is an independent, international non-governmental organization that investigates and reports on rights violations in over 100 countries worldwide. Human Rights Watch documents and reports on human rights abuses and directs advocacy toward governments, armed groups, and businesses, pressing them to change or enforce their laws, policies, and practices to respect and uphold rights for all people.

**Ipas** is a non-governmental organization that builds resilient abortion and contraceptive ecosystems using a comprehensive approach across sectors, institutions, and communities. Ipas works across institutions and communities and recognizes there are multiple factors that influence a person's ability to access abortion — including individual knowledge and power, community and political support, trained and equipped health systems, and laws and policies that uphold the human rights to health and to bodily autonomy.

**Obstetricians for Reproductive Justice (ORJ)** is a multicultural OBGYN-led organization that works to share the stories of the real-time harm happening to patients and providers in post-Roe America.

**RH Impact** is a Black woman-led organization that creates transnational solutions to optimize Black infant health, maternal health, and sexual and reproductive well-being.

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trainings, convenings, technical assistance and strategic advice with a particular focus on the dynamics in each state. SiX supports legislators who are working to: strengthen our democracy, fight for working families, advance reproductive freedom, defend civil rights and liberties, and protect the environment.

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# I. Introduction

Since the United States (US) was last reviewed by the Human Rights Committee (HRC) nearly a decade ago in 2014, there have been significant developments in the area of sexual and reproductive health and rights (SRHR) for women, girls, and people who can become pregnant<sup>1</sup> living in the US, including the *Dobbs v. Jackson Women's Health Organization* decision in June 2022.<sup>2</sup> This decision overturned the constitutional right to abortion in the US after 50 years of precedent following the US Supreme Court's decision in *Roe v. Wade* in 1973.<sup>3</sup>

Human rights experts warned before the *Dobbs* decision that overturning *Roe* would violate the rights of women, girls, and all people who can become pregnant in the US, as well as healthcare providers' rights.<sup>4</sup> Following the decision, the experts noted that whereas the restrictive new legal environment would not reduce the need for abortions, it would be guaranteed to increase the number of women and girls seeking clandestine and unsafe abortions, particularly for people of color and those living in poverty, and would fuel abortion stigma, leading to abuse of people in need of post-abortion care. They added:

The decision to continue a pregnancy or terminate it must fundamentally and primarily be a woman's decision as it will shape her whole future personal life and family life. The right of a woman to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality, non-discrimination, health, and privacy.<sup>5</sup>

As our submission details below, the restrictive environment around abortion in the US now also violates the rights to life and to be free of torture or other cruel, inhuman, or degrading treatment

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<sup>1</sup> This paper refers interchangeably to “people who can become pregnant” and “women and girls” as the targets of laws restricting abortion. Although most people who can become pregnant and require abortion services are cisgender women, we recognize that people with diverse gender identities may also need abortions and are profoundly affected by abortion restrictions. For more information on the need for abortion services amongst trans, non-binary and gender diverse people in the United States, see Heidi Moseson *et al.*, *Abortion experiences and preferences of transgender, nonbinary, and gender-expansive people in the United States*, 224 AM. J. OBSTETRICS & GYNECOLOGY 4 (2021); American College of Obstetricians and Gynecologists, *ACOG Committee Opinion: Health Care for Transgender and Gender Diverse Individuals*, 137 OBSTETRICS & GYNECOLOGY 3, e80-e81 (Mar. 2021), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2021/03/health-care-for-transgender-and-gender-diverse-individuals.pdf>

<sup>2</sup> *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022).

<sup>3</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>4</sup> Brief Of United Nations Mandate Holders As Amici Curiae In Support Of Respondents, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022).

<sup>5</sup> Press release, OHCHR, USA: UN experts denounce Supreme Court decision to strike down *Roe v. Wade*, urge action to mitigate consequences (June 24, 2022), <https://www.ohchr.org/en/press-releases/2022/06/usa-un-experts-denounce-supreme-court-decision-strike-down-roe-v-wade-urge>

(CIDT), as well as rights to free expression and movement, as guaranteed under the International Covenant on Civil and Political Rights (ICCPR).

While there were significant abortion restrictions and an increasingly hostile environment for reproductive rights in certain parts of the country prior to *Dobbs*, this decision opened the floodgates for extreme abortion bans. There are now complete or near-complete bans on abortion in 15 states, while many others have enacted or maintain extreme restrictions, thereby further decreasing access to legal abortion. Moreover, recent litigation and new state laws threaten the availability of mifepristone, a safe and effective drug used for medical abortion.<sup>6</sup> The hostile environment has degraded the overall reproductive healthcare landscape in the country: recent analysis shows that “over 1.7 million women, nearly 3% of women of reproductive age in the United States, live in a county without access to abortion and with no access to maternity care.”<sup>7</sup> Experts in maternal mortality expect the situation to worsen.<sup>8</sup>

The impacts of the deterioration are not equally distributed. Instead, they map onto existing patterns of racial discrimination, economic inequality, and marginalization. Black, Indigenous, and other people of color (BIPOC) are disproportionately likely to need abortion care due to inequalities in healthcare access and other systemic barriers, and also disproportionately live in states with abortion bans. Youth and young people under 18 face additional hurdles to care.

This submission describes: II) The human rights crisis caused by abortion restrictions in the US; III) Violations of specific ICCPR rights; and IV) Conclusions and recommendations for the HRC. The authors analyzed public reporting, legislative, judicial, and administrative decisions, and solicited submissions from abortion providers and seekers detailing their experiences related to abortion care in the United States after the *Dobbs* decision.<sup>9</sup> Summaries of these patient and provider experiences, as well as details of certain stories, are included in this submission.

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<sup>6</sup> *Alliance Hippocratic Medicine v. FDA*, No. 23-10362 (5th Cir. 2023). See also Pam Belluck & Adam Liptak, *Appeals Court Upholds Legality of Abortion Pill but With Significant Restrictions*, N.Y. TIMES (Aug. 16, 2023), <https://www.nytimes.com/2023/08/16/health/abortion-pill-ruling.html>. *The State Abortion Policy Landscape One Year Post-Roe*, GUTTMACHER INSTITUTE (June 15, 2023), <https://www.guttmacher.org/2023/06/state-abortion-policy-landscape-one-year-post-roe>

<sup>7</sup> Nicole Wetsman et. al., *Maternal care deserts overlap with lack of abortion access, analysis*, ABC NEWS (Aug. 1, 2023), shows <https://abcnews.go.com/Health/abortion-access-restrictions-affect-maternity-care-access-research/story?id=101770115>

<sup>8</sup> *Id.*

<sup>9</sup> Testimonies were collected by Obstetricians for Reproductive Justice (ORJ) between April 30 and May 1, 2023, screened to ensure relevance and timeliness, and anonymized. A total of 70 testimonies were provided. Full testimonies are on file with the authors.

## II. The Human Rights Crisis Caused by Abortion Restrictions

### Criminalization and Penalization

As of September 8, 15 states have enacted and are enforcing full bans on abortion in almost all circumstances.<sup>10</sup> Of these, 10 have no exceptions whatsoever for cases of rape or incest; the remaining five each have some limited exceptions in cases of rape or incest, but impose significant barriers on access in those circumstances (such as requiring a police report to be filed and provided to a doctor before the procedure).<sup>11</sup> Two additional states, Georgia and South Carolina, are enforcing a ban on abortions after six weeks, when most people do not yet know they are pregnant.<sup>12</sup> A further eight states' early gestation bans — between six and eight weeks — are currently blocked by temporary or permanent court orders.<sup>13</sup> Overall, in at least 26 states — accounting for more than 166 million people, approximately half of the US population — abortion is either banned completely, heavily restricted to the earliest days of pregnancy, or is likely to face further restrictions depending on the outcome of legal cases.<sup>14</sup>

The restrictions in these states comprise a hodgepodge of criminal, civil, and privately enforced restrictions.<sup>15</sup> Many states have multiple, potentially contradictory statutes, including previously dormant historical prohibitions; “trigger” bans passed before *Dobbs* and designed to take effect if *Roe*

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<sup>10</sup> *Tracking Abortion Bans Across the Country*, N.Y. TIMES (accessed Sept. 8, 2023), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html>; *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (Aug. 29, 2023),

<https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions>. Nearly 85 million people live in these fifteen states. *State Population Totals and Components of Change: 2020-2022*, U.S. CENSUS BUREAU (June 13, 2023), <https://www.census.gov/data/tables/time-series/demo/pepest/2020s-state-total.html>

<sup>11</sup> Randi Kaye & Stephen Samaniego, *Idaho's murky abortion law is driving doctors out of the state*, CNN (May 13, 2023), <https://www.cnn.com/2023/05/13/us/idaho-abortion-doctors-drain/index.html>

<sup>12</sup> Jess Mador, *On the anniversary of Georgia's abortion law going into effect, protesters target Atlanta clinics*, WABE (July 20, 2023), <https://www.wabe.org/on-the-anniversary-of-georgias-abortion-law-going-into-effect-protesters-target-atlanta-clinics/>.

<sup>13</sup> Moreover, each of the states that currently prohibit abortion between twelve and twenty weeks has attempted to pass more restrictive abortion legislation, usually a six week ban, but the legislation has either been blocked by courts or failed at the legislative stage. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. *supra* note 10.

<sup>14</sup> *Tracking Abortion Bans Across the Country*, N.Y. TIMES *supra* note 10; U.S. CENSUS BUREAU *supra* note 10.

<sup>15</sup> Several states are experimenting with privately-enforced bans, in which bystanders can sue providers if they suspect that the providers have violated the state's abortion prohibition. These provisions multiply the confusion and legal risk facing patients and providers. However, due to space constraints, this report focuses on direct criminalization by the state. For more on the impact of the private enforcement provisions, see *Human Rights Crisis: Abortion in the United States After Dobbs*, GLOBAL JUSTICE CTR. ET.AL. at 17-18 (Apr. 2023), [https://www.globaljusticecenter.net/files/20230413\\_UN\\_SR\\_briefingPaper\\_FINAL.pdf](https://www.globaljusticecenter.net/files/20230413_UN_SR_briefingPaper_FINAL.pdf)

were overturned; and new bans passed in the last year.<sup>16</sup> The resultant tangle of prohibitions creates unclear legal liability, chilling even permitted conduct and ensnaring patients and providers alike in the country's notorious criminal legal system.<sup>17</sup>

These measures to criminalize or penalize abortion, including targeting of patients and providers alike, infringe upon a number of rights under the ICCPR. This Committee has clarified the legal obligations implicated by abortion regulation: To be compliant with states' human rights obligations, abortion regulations must not " ...violate women's and girls' right to life, jeopardize their lives, subject them to physical or mental pain or suffering, discriminate against them, or arbitrarily interfere with their privacy."<sup>18</sup> Criminalization and other penal approaches to abortion violate civil and political rights of patients and providers, implicating Article 3 (equal rights between men and women), Article 6 (life), Article 9 (liberty and security of person; arbitrary arrest or detention), Article 12 (liberty of movement), Article 17 (arbitrary interference with privacy, family, home), Article 19 (right to free expression including to seek and impart information), and Article 26 (equality before the law and right to non-discrimination) of the ICCPR.<sup>19</sup>

### *Increasing Penalties and Targeting Patients*

All 15 states that ban abortion at all stages of pregnancy enforce these bans with criminal prosecutions, with penalties ranging from less than a year to potential life in prison.<sup>20</sup> Most states with bans based on stage of pregnancy also place these regulations in their penal codes, enforcing them with criminal sanctions.<sup>21</sup> At least 30 bills have been proposed across the country to increase criminal penalties or broaden prohibitions on abortion over the past year alone.<sup>22</sup> In South Carolina, a bill was proposed

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<sup>16</sup> For example, Wisconsin is currently litigating whether a 1849 total abortion ban remains good law; it was never repealed, but subsequent regulations on the procedure, adopted after Roe, conflict with the total ban. As a result of the confusion and ongoing litigation, Wisconsin clinics have stopped providing all abortion care. Maayan Silver, *A breakdown of the main legal arguments in Wisconsin's abortion law*, WUWM (May 4, 2023),

<https://www.wuwm.com/2023-05-04/a-breakdown-of-the-main-legal-arguments-in-wisconsin-abortion-law-case>; In Oklahoma, three overlapping bans were enforced for months before the state supreme court struck down two of them (both of which included private enforcement), leaving the state's 1910 criminal prohibition intact. Sean Murphy, *Oklahoma high court strikes down 2 abortion bans; procedure remains illegal in most cases*, AP NEWS (June 1, 2023), <https://apnews.com/article/abortion-oklahoma-supreme-court-medical-emergency-74841ced6cc1f247dc9bcf00d5d2403a>

<sup>17</sup> Global Justice Center et. al., *Submission to the United Nations Committee on the Elimination of Racial Discrimination* at 8-10 (Aug. 2022), [https://globaljusticecenter.net/files/SBRWI\\_HRW\\_GJC\\_AI\\_CERDShadowReport.pdf](https://globaljusticecenter.net/files/SBRWI_HRW_GJC_AI_CERDShadowReport.pdf)

<sup>18</sup> Human Rts. Comm., General comment No. 36, Art. 6: right to life, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) [hereinafter "HRC General Comment 36"].

<sup>19</sup> International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 1966) [hereinafter "ICCPR"].

<sup>20</sup> Oriana González, *How states enforce anti-abortion laws* AXIOS (June 24, 2022),

<https://www.axios.com/2022/06/08/abortion-bans-penalty-fines-prison-us-states>

<sup>21</sup> *Post-Dobbs State Abortion Restrictions and Protections*, CTR. FOR PUB. HEALTH LAW RSCH. (Jan. 1, 2023)

<https://lawatlas.org/datasets/post-dobbs-state-abortion-restrictions-and-protections>

<sup>22</sup> David W. Chen, *A New Goal for Abortion Bills: Punish or Protect Doctors*, N.Y. TIMES, (Feb. 16, 2023),

<https://www.nytimes.com/2023/02/16/us/abortion-bills-doctors.html>

specifically to reclassify abortion as homicide. This reclassification would make anyone performing or providing abortions — including both patients who self-manage their abortions, as well as providers — potentially subject to the death penalty.<sup>23</sup> Similarly, some states have initiated criminalization approaches based on “fetal personhood,”<sup>24</sup> a concept that attributes legal rights to a fetus.<sup>25</sup> Where they are adopted, these provisions may be used to increase the penalties applicable to anyone convicted of abortion-related offenses by classifying abortion as homicide.<sup>26</sup>

Abortion bans are increasingly targeting pregnant people themselves. Although some states exclude pregnant persons from prosecution in their abortion bans, the risk that people will be prosecuted for ending their own pregnancies was increasing even before *Dobbs* opened the floodgates. Analysis of cases

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<sup>23</sup>Rebecca Kluchin, *Punishable by death—how the US anti-abortion movement ended up proposing the death penalty*, 380 BMJ 711 (2023); No such bill has yet passed. S.C. H3549, 125th Session (2023-24), [https://www.scstatehouse.gov/sess125\\_2023-2024/bills/3549.htm](https://www.scstatehouse.gov/sess125_2023-2024/bills/3549.htm)

<sup>24</sup>*When Fetuses Gain Personhood: Understanding the Impact on IVF, Contraception, Medical Treatment, Criminal Law, Child Support, and Beyond*, PREGNANCY JUSTICE (Aug. 17, 2022), <https://pregjustdev.wpengine.com/wp-content/uploads/2022/08/Fetal-Personhood-Issue-8.17.22.pdf>. See also *Who Do Fetal Homicide Laws Protect? An Analysis for a Post-Roe America*, PREGNANCY JUSTICE <https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2022/08/Feticide-Brief-w-Appendix.pdf>; 4 states are using fetal personhood to put women behind bars, NPR, (Aug. 11, 2023), <https://www.npr.org/2023/08/11/1193393737/4-states-are-using-fetal-personhood-to-put-women-behind-bars#:~:text=What%20exactly%20is%20fetal%20personhood,as%20a%20full%2Dborn%20child>; Cary Aspinwall, *These States Are Using Fetal Personhood to Put Women Behind Bars*, THE MARSHALL PROJECT (July 25, 2023), <https://www.themarshallproject.org/2023/07/25/pregnant-women-prosecutions-alabama-oklahoma>.

<sup>25</sup> International human rights law (IHRL) makes clear that its protections start at birth and that fetal personhood has no basis in IHRL. See Working Grp. on discrimination against women and girls in law and practice, *Women’s Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends* (Oct. 2017), <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf> (“It was well settled in the 1948 [Universal Declaration of Human Rights] and upheld in the ICCPR that the human rights accorded under IHRL are accorded to those who have been born. ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’”). The Working Group cites inter alia the travaux préparatoires of Article 6 of the ICCPR, in which proposed amendments suggesting that the right to life applied before birth were specifically rejected by states. UN GAOR, 12th Session, Agenda Item 33, at 119 (e), (q), U.N. Doc. A/3764, (Dec. 5, 1957).

<sup>26</sup> Madeleine Carlisle, *Fetal Personhood Laws Are a New Frontier in the Battle Over Reproductive Rights*, TIME (June 28, 2022), <https://time.com/6191886/fetal-personhood-laws-roe-abortion/>. Fetal personhood provisions could also lead to non-abortion-related conduct being criminalized. Kaia Hubbard, *Making Abortion Murder*, U.S. NEWS (May 6, 2022), <https://www.usnews.com/news/national-news/articles/2022-05-06/the-push-to-make-fetuses-people-and-abortion-murder/>. A Louisiana House of Representatives committee voted in May 2022 to amend criminal laws to make abortion qualify as a homicide. While the bill was subsequently withdrawn, other states are exploring fetal personhood approaches to criminalizing a range of pregnancy outcomes. See Oriana Gonzalez, *Louisiana abortion bill allowing homicide charges against patients stopped for now*, AXIOS (May 13, 2022), <https://www.axios.com/2022/05/13/louisiana-abortion-bill-homicide-patient-roe>; Adrian Sainz & Kimberlee Kruesi, *Memphis council resolution addresses abortion prosecutions*, THE ASSOCIATED PRESS (July 12, 2022), <https://apnews.com/article/abortion-2022-midterm-elections-us-supreme-court-health-nashville-92c4834b3b0fd10e487c2bc75020c03d>. A 2021 study from the National Association of Criminal Defense Lawyers and Pregnancy Justice determined that there are thousands of federal and state crimes already on the books that prosecutors can and have used to charge pregnant persons in a post-Roe world. See *Abortion in America: How Legislative Overreach Is Turning Reproductive Rights Into Criminal Wrongs*, NAT’L ASS’N OF CRIM. DEF. LAWYERS (Aug. 2021), <https://www.nacdl.org/Document/AbortioninAmericaLegOverreachCriminalizReproRights>;



from 2000 to August 2022 identified at least 61 cases of criminal investigation or arrest of people specifically for self-managing their own abortion, or helping another person self-manage.<sup>27</sup>

In Idaho, a statute from 1973 states that a woman “who purposely terminates her own pregnancy otherwise than by a live birth” can be found guilty of a felony.<sup>28</sup> This statute is newly enforceable post-*Dobbs*.<sup>29</sup> Likewise, under a recently enacted South Carolina law, any pregnant person who procures or self-manages an abortion “except as otherwise permitted [under the state’s abortion regulations]” can be charged with a misdemeanor and imprisoned for up to two years.<sup>30</sup> After legal challenges, South Carolina’s six-week ban was allowed to take effect on August 23, 2023, potentially permitting the criminalization of patients for self-managing an abortion after six weeks.<sup>31</sup>

An abortion seeker in the South shared her fears:

I battle with postpartum depression to the point that I’m terrified of getting pregnant again. I told myself if I became pregnant again before I was stable or ready I would have an abortion. But unfortunately I live in a state where it is banned after 6 weeks and my state investigates miscarriages, so I’m terrified of becoming pregnant again. My options are gone and the idea of potentially facing jail time if I miscarry or have an abortion is terrifying. ... [N]ot only do I fear for myself, I fear for my daughter.<sup>32</sup>

In the hostile climate following *Dobbs*, some state officials have also indicated increasing willingness to prosecute people who attempt to terminate their own pregnancies even where the text of specific abortion bans exempts the patients themselves from prosecution. In Alabama, where the abortion ban specifically exempts pregnant people from prosecution<sup>33</sup> the state attorney general has nevertheless declared that he intends to prosecute anyone who distributes or takes abortion pills under a long-standing “chemical endangerment” law designed to protect children from hazardous environments in the home.<sup>34</sup> Pre-*Dobbs*, a Texas woman was arrested and charged with murder for

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<sup>27</sup> *Decriminalizing Self-Managed and Supported Non-Clinical Abortion*, IF WHEN HOW

<https://www.ifwhenhow.org/resources/self-care-criminalized-preliminary-findings/>

<sup>28</sup> Idaho Code §18-606 (1973), <https://legislature.idaho.gov/statutesrules/idstat/title18/t18ch6/sect18-606/>.

<sup>29</sup> Kim Stanger, *Idaho’s Amended Abortion Laws: Summary and Updated FAQs*, HOLLAND & HART (Apr. 13, 2023), <https://www.hollandhart.com/idahos-amended-abortion-laws-summary-and-updated-faqs>

<sup>30</sup> S.C. Code § 44-41-680 (2022).

<sup>31</sup> James Pollard, *South Carolina’s new all-male highest court reverses course on abortion , upholding strict 6-week ban*, AP NEWS (Aug. 23, 2023), <https://apnews.com/article/south-carolina-abortion-ban-f4e0d8ef8187fdd1e8db54dd464011b9>

<sup>32</sup> Testimony of abortion seeker, submitted to ORJ (May 2023) (on file with authors). The patient’s state of residence has been omitted to preserve her privacy.

<sup>33</sup> The law states, “No woman upon whom an abortion is performed or attempted to be performed shall be criminally or civilly liable.” The Alabama Human Life Protection Act., HB 314 (2019).

<sup>34</sup> See Amy Yurkanin, *Women can be prosecuted for taking abortion pills, says Alabama attorney general*, AL.COM (Jan. 10, 2023), <https://www.al.com/news/2023/01/women-can-be-prosecuted-for-taking-abortion-pills-says-alabama-attorney-general.html>. (In addition, “The chemical endangerment law has been used to incarcerate women for years who have had miscarriages or stillbirths after using drugs. [Some Alabama] officials jailed pregnant women for months before trial

allegedly self-inducing an abortion — a charge for which there is no legal basis, as acknowledged by the prosecutor when they subsequently dropped the charges.<sup>35</sup> Stories of criminal charges like these contribute to a strong public impression that pregnant people themselves can, and are likely to be, prosecuted,<sup>36</sup> further chilling abortion access even where legal.

Others have been prosecuted under, for example, laws designed to ensure appropriate disposal of human remains. On July 20, 2023, a 19-year-old in Nebraska was sentenced to 90 days in jail and two years of probation for “concealing or abandoning a dead body” after she had a stillbirth at 29 weeks pregnant, when she was 17.<sup>37</sup> The young woman and her mother were charged after police obtained Facebook messages between them about self-managing an abortion (which is not illegal in Nebraska). Nevertheless, prosecutors used laws unrelated to abortion to prosecute both mother and daughter.

Even prior to *Dobbs*, prosecutors used similar laws to charge people in situations where they suspected that their actions during pregnancy harmed the fetus.<sup>38</sup> Alleged conduct deemed worthy of prosecution went beyond suspected abortions to include using drugs (even where prescribed by a doctor), drinking alcohol, and falling down stairs.<sup>39</sup> More than 1,700 instances of arrests, forced medical interventions, and other deprivations of liberty of pregnant people have been documented since 1973, with 1,331 of these cases occurring between 2006-2020.<sup>40</sup> This sharp escalation in arrests is particularly concerning given that states now have no federal restrictions on their ability to criminalize people for their reproductive decisions or outcomes.

Some jurisdictions also have policies of civil or administrative detention to hold pregnant people in custody — without criminal charges — if they are suspected of behavior during pregnancy that might

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under bond conditions designed to protect fetuses, despite evidence that incarceration increases the risk of pregnancy loss.”)

<sup>35</sup> Mary Ziegler, *Lizelle Herrera's Texas arrest is a warning* NBC NEWS: THINK (Apr. 16, 2022),

<https://www.nbcnews.com/think/opinion/lizelle-herrerass-texas-abortion-arrest-warning-rcna24639>

<sup>36</sup> Katherine Gilyard, *A vast majority of Americans are concerned people could face criminal penalties for abortion*, THE 19TH NEWS (Jan. 30, 2023), <https://19thnews.org/2023/01/americans-concerned-possibility-abortion-crime/>

<sup>37</sup> Susan Rinkunas, *Prosecutors Want You to Judge the Nebraska Teen Who Took Abortion Pills*, JEZEBEL (July 20, 2023) <https://jezebel.com/nebraska-teen-sentenced-to-90-days-in-jail-for-self-man-1850656813>

<sup>38</sup> *Alabama Mother Prosecuted for Taking Prescription During Pregnancy*, EQUAL JUSTICE INITIATIVE (July 12 2021), <https://eji.org/news/alabama-mother-prosecuted-for-taking-prescription-during-pregnancy/>.

<sup>39</sup> Lynn Paltrow & Lisa K. Sangoi, *The dangerous state laws that are punishing pregnant people*, THINK PROGRESS (Sept. 28, 2016), <https://archive.thinkprogress.org/criminalization-pregnancy-us-43e4741bb514/>; *Criminalizing Pregnancy: Policing Pregnant Women who Use Drugs in the USA*, AMNESTY INT'L (May 23, 2017), <https://www.amnesty.org/en/documents/amr51/6203/2017/en/>.

<sup>40</sup> *Confronting Pregnancy Criminalization: A Practical Guide for Healthcare Providers, Lawyers, Medical Examiners, Child Welfare Workers, and Policymakers*, PREGNANCY JUSTICE at 6 (July 2022), <https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/202211-PJ-Toolkit-Update-2.pdf>; *Arrests and Other Deprivations of Liberty of Pregnant Women, 1973-2020*, PREGNANCY JUSTICE (Sept. 2021), [https://www.pregnancyjusticeus.org/wp-content/uploads/2021/09/FINAL\\_1600cases-Factsheet.docx.pdf](https://www.pregnancyjusticeus.org/wp-content/uploads/2021/09/FINAL_1600cases-Factsheet.docx.pdf).

lead to miscarriage or harm to a fetus.<sup>41</sup> Even in states that do not explicitly criminalize people who seek abortions, authorities have used civil commitment and involuntary substance abuse treatment to detain individuals for allegedly endangering their fetuses.<sup>42</sup> Moreover, because spontaneous miscarriage and self-managed abortion are medically indistinguishable in most cases,<sup>43</sup> prohibitions on abortion will predictably lead to the investigation and detention of many individuals experiencing miscarriage or stillbirth,<sup>44</sup> as well as those self-managing abortions, as seen in other countries including El Salvador,<sup>45</sup> Ecuador,<sup>46</sup> and Honduras.<sup>47</sup>

UN human rights experts have already documented and denounced practices of investigating and detaining pregnant people for a range of suspected conduct or pregnancy outcomes. Following their 2016 country visit to the US, the UN Working Group on arbitrary detention observed, “The civil proceedings to commit pregnant women are often in closed hearings, lack meaningful standards and provide few procedural protections. In some states, important early hearings may take place without the mother having legal representation, as the pregnant woman does not have the right to appointed counsel although the fetus has a court-appointed guardian ad litem.”<sup>48</sup> Pregnant individuals have been arbitrarily detained under these policies for months at a time.

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<sup>41</sup> See Wisconsin’s ‘Unborn Children Protection Act’ (Act 292), PREGNANCY JUSTICE (May 16, 2022), <https://www.nationaladvocatesforpregnantwomen.org/fact-sheet-wisconsins-unborn-child-protection-act-act>.

<sup>42</sup> See Idaho Code § 18-622 (2020), <https://legislature.idaho.gov/statutesrules/idstat/title18/t18ch6/sect18-622/#:~:text=18%2D622.,the%20crime%20of%20criminal%20abortion>. “Nothing in this section shall be construed to subject a pregnant woman on whom any abortion is performed or attempted to any criminal conviction and penalty.”; Shelbie Harris, *Local woman facing 10 years in prison for allegedly using meth the day she gave birth*, IDAHO STATE JOURNAL (June 6, 2021), [https://www.idahostatejournal.com/news/local/local-woman-facing-10-years-in-prison-for-allegedly-using-meth-the-day-she-gave/article\\_e03d4800-cf40-5263-a7d3-085d2d7df2b4.html/](https://www.idahostatejournal.com/news/local/local-woman-facing-10-years-in-prison-for-allegedly-using-meth-the-day-she-gave/article_e03d4800-cf40-5263-a7d3-085d2d7df2b4.html/); Leticia Miranda et al., *How States Handle Drug Use During Pregnancy* PROPUBLICA (Sept. 30, 2015), <https://projects.propublica.org/graphics/maternity-drug-policies-by-state>.

<sup>43</sup> “From a medical perspective, there is no physically significant difference between a medication abortion and a spontaneously occurring miscarriage. For example, the medicines used in medication abortion are used to help safely manage an incomplete miscarriage.” *Consumer Health Info: Medication Abortion and Miscarriage*, NAT’L WOMEN’S HEALTH CTR. (Aug. 15, 2019), <https://nwhn.org/abortion-pills-vs-miscarriage-demystifying-experience/>

<sup>44</sup> Cary Aspinwall et. al., *They Lost Their Pregnancies. Then Prosecutors Sent Them To Prison*, THE MARSHALL PROJECT (Sept. 1, 2022),

<https://www.themarshallproject.org/2022/09/01/they-lost-their-pregnancies-then-prosecutors-sent-them-to-prison>

<sup>45</sup> *Salvadoran women, jailed for decades for miscarriages, stillbirths, warn the U.S. about abortion bans*, NBC NEWS (June 10, 2022), <https://www.nbcnews.com/news/latino/salvadoran-women-jailed-decades-miscarriages-stillbirths-warn-us-abort-rcna33035>

<sup>46</sup> “*Why Do They Want to Make Me Suffer Again?*” *The Impact of Abortion Prosecutions in Ecuador*, HUMAN RTS. WATCH (July 14, 2021), <https://www.hrw.org/report/2021/07/14/why-do-they-want-make-me-suffer-again/impact-abortion-prosecutions-ecuador>

<sup>47</sup> Amy Braunschweiger & Margaret Wurth, *Life or Death Choices for Women Living Under Honduras’ Abortion Ban: Women Tell Their Stories*, HUMAN RTS. WATCH (June 6, 2019)

<https://www.hrw.org/news/2019/06/06/life-or-death-choices-women-living-under-honduras-abortion-ban>

<sup>48</sup> Rep. of the Working Group on Arbitrary Detention on its visit to the United States of America, ¶ 74 (U.N. Doc. A/HRC/36/37/Add.2) (July 17, 2017).

## *Targeting Providers: Criminalization, Aiding and Abetting Liability, and Curbs on Free Expression*

Most states with bans impose criminal liability directly on providers, and also mandate suspension or revocation of medical licenses for performing abortions except under limited, emergency conditions.<sup>49</sup> This punitive approach creates a uniquely treacherous environment for doctors providing a range of pregnancy-related care. Doctors report that criminalization forces them to navigate between violating medical ethics by letting their patients get sicker or die (and facing civil malpractice liability) or facing felony charges for providing medically necessary care. In an interview with CNN, one doctor noted:

If I don't act fast enough to save [the patient's] life, prevent [them] from getting septic, I could be liable for civil cases... But if I act too quickly and I'm not 100% certain that the patient is going to die from the complication [they're] sustaining, then I could be guilty of a felony.<sup>50</sup>

As a result of this impossible environment, some providers are relocating or ceasing to provide care to pregnant patients altogether.<sup>51</sup>

Doctors also report that they are being prevented from speaking openly with their patients about pregnancy-related care. In Idaho, the state attorney general initially issued a letter indicating that any provider who referred patients across state lines for abortion care could be prosecuted under the state's ban.<sup>52</sup> After a lawsuit challenged the guidance on free speech grounds, the attorney general withdrew the letter — leaving the status of out-of-state referrals unclear.<sup>53</sup> Doctors across the country similarly report that the rapidly shifting landscape has impaired their ability to counsel patients. As one doctor from Indiana said “We're trying to be very, very careful and it is so scary to me to know that I'm not only worrying about my patients' medical safety, which I always worry about, but now I am worrying about their legal safety, my own legal safety.”<sup>54</sup>

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<sup>49</sup> See Idaho Code § 18-622 (2020); M.O. HB 126 §188.017, § B (2019); For more on the unworkability of exceptions, see *infra*, *Chilling Effects and Deadly Consequences of Exceptions-Based Abortion Restrictions*, 19.

<sup>50</sup> Randi Kaye & Stephen Samaniego, *Idaho's murky abortion law is driving doctors out of the state*, CNN (May 13, 2023), <https://www.cnn.com/2023/05/13/us/idaho-abortion-doctors-drain/index.html>

<sup>51</sup> Julie Rovner, *Abortion bans drive off doctors and close clinics, putting other health care at risk*, NPR (May 23, 2023), <https://www.npr.org/sections/health-shots/2023/05/23/1177542605/abortion-bans-drive-off-doctors-and-put-other-health-care-at-risk>; See *infra* *Impacts of Abortion Bans on the Health and Lives of Pregnant Persons*, 14 for more on “maternal care deserts” resulting from bans.

<sup>52</sup> Letter from Raúl R. Labrador, Attorney General to the Idaho House of Representatives (Mar. 27, 2023), [https://759dc218-b8c7-48ed-a4df-e92eb29273e5.filesusr.com/ugd/bc9708\\_de4a35f4a6854c0690cf88ecc810f97a.pdf](https://759dc218-b8c7-48ed-a4df-e92eb29273e5.filesusr.com/ugd/bc9708_de4a35f4a6854c0690cf88ecc810f97a.pdf)

<sup>53</sup> An attorney for the doctors challenging the guidance noted, “...I still have a situation where I have doctors who need to tell patients what their options are and are not sure if they can do a complete, accurate and fair job of doing that without facing personal risk.” Devan Cole, *Idaho AG rescinds legal opinion that said health care providers can't make out-of-state abortion referrals*, CNN (Apr. 7, 2023), <https://www.cnn.com/2023/04/07/politics/idaho-abortion-referrals-guidance-rescinded/index.html>.

<sup>54</sup> Selena Simmons-Duffin, *Doctors Weren't Considered in Dobbs, But Now They're on Abortion's Legal Front Lines*, NPR (July 3, 2022),

Providers' ability to express their expertise and opinions in public policy or political conversations has also been curtailed. In Indiana, a doctor provided abortion care to a 10-year-old girl from Ohio who had become pregnant as a result of rape. The abortion ban in Ohio (in force at the time, but which is now temporarily enjoined) contained no exceptions for victims of rape or incest, forcing the child to cross state lines to receive care. When the doctor spoke publicly about the disturbing facts of the case, without divulging identifying patient details or protected medical information, she was chastised by Indiana's attorney general, investigated by her employer (who found no violations of patient privacy), and ultimately censured and fined by the state medical licensing board.<sup>55</sup>

Some states with bans also impose criminal liability for "aiding or abetting" abortion, making it a crime for any individual, whether a healthcare provider or not, to assist a pregnant person in obtaining an abortion.<sup>56</sup> This can apply to hospital administrative staff, therapists, and other medical professionals who have discussed or provided information about obtaining an abortion; family, friends, or religious

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<https://www.npr.org/sections/health-shots/2022/07/03/1109483662/doctors-werent-considered-in-Dobbs-but-now-t heyre-on-abortions-legal-front-lines>

<sup>55</sup> The members of the state board are appointed by the governor, who opposes abortion. Hundreds of Indiana doctors signed an open letter to the board in response, voicing concern that the censure threatened their freedom of expression. *Doctors rally to defend abortion provider Caitlin Bernard after she was censured*, NPR (June 3, 2023)

<https://www.npr.org/transcripts/1179941247#:~:text=In%20an%20open%20letter%20to,not%20to%20take%20this%20case.>

<sup>56</sup> For example, Texas's pre-Roe abortion ban explicitly included accomplice liability ("Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice") Tex. Pen. Code art. 1192 (1925), <https://www.sll.texas.gov/assets/pdf/historical-statutes/1925/1925-3-penal-code-of-the-state-of-texas.pdf#page=279>.

Other states, in defining abortion as a felony, have imported generally applicable aiding and abetting provisions. *See, e.g.,* Guidance for Oklahoma law enforcement following Dobbs v. Jackson Women's Health Org (Aug. 31, 2022) (citing Oklahoma definitions of principal and accessory criminal liability, and opining, "Oklahoma law prohibits aiding and abetting the commission of an unlawful abortion, which may include advising a pregnant woman to obtain an unlawful abortion. See 21 O.S. §§ 171-172, 861..."). Meanwhile, Alabama, Arizona, Arkansas, Florida, and Ohio have considered such a provision. *See* H.B. 4327, 2022 Leg., Reg. Sess. (Okla. 2022); H.B. 23, 2022 Leg., Reg. Sess. (Ala. 2022); H.B. 2483, 55<sup>th</sup> Leg., 2<sup>nd</sup> Reg. Sess. (Ariz. 2022); S.B. 13, 93<sup>rd</sup> Gen. Assemb., 2<sup>nd</sup> Extraordinary Sess. (Ark. 2021); H.B. 167, 124<sup>th</sup> Leg., Reg. Sess. (Fla. 2022); H.B. 480, 134<sup>th</sup> Gen. Assemb., Reg. Sess. (Ohio 2021). *See also* Jia Tolentino, *We're Not Going Back to the Time Before Roe. We're Going Somewhere Worse*, THE NEW YORKER (June 24, 2022),

<https://www.newyorker.com/magazine/2022/07/04/we-are-not-going-back-to-the-time-before-roe-we-are-going-some-where-worse/amp>.

leaders; or potentially even drivers who transport patients to abortion clinics.<sup>57</sup> Employers, family members, or friends who contribute financial or other support can also be criminalized.<sup>58</sup>

The expansive and ill-defined reach of secondary liability for medical providers has led to grotesque outcomes. For example, in one state with a ban, a doctor described the care of a patient experiencing a miscarriage, reporting that “multiple members of the health care team declined to be involved in [the patient’s] care because of the state law in effect.”<sup>59</sup> The doctor continued:

Anesthesiology colleagues refused to provide an epidural for pain. They believed that providing an epidural could be considered [a crime] under the new law. The patient received some IV morphine instead and delivered a few hours later but was very uncomfortable through the remainder of her labor. I will never forget this case because I overheard the primary provider say to a nurse that so much as offering a helping hand to a patient getting onto the gurney while in the throes of a miscarriage could be construed as ‘aiding and abetting an abortion.’

### *Restricting Travel Across State Lines*

Some states are attempting to enforce their bans across state lines. Idaho became the first state to criminalize travel for abortion care in certain circumstances: in April 2023, it criminalized helping a minor leave Idaho for an abortion without the knowledge and consent of the minor’s parents.<sup>60</sup> Although the legality of criminalizing interstate travel is uncertain,<sup>61</sup> lawmakers in several states that

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<sup>57</sup> Robert Klitzman, *Opinion: Roe’s reversal doesn’t just hurt women – it harms us all*, CNN (June 25, 2022), <https://www.cnn.com/2022/06/25/opinions/medical-ethics-post-roe-world-klitzman/index.html>. See also Jia Tolentino, *supra* note 56. Virtually all of the “trigger laws” punish those conducting and/or aiding an abortion. See also Amanda Zablocki & Mikela T. Sutrina, *The Impact of State Laws Criminalizing Abortion*, LEXIS NEXIS (Sept. 28, 2022), <https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/the-impact-of-state-laws-criminalizing-abortion> (Noting potential aiding and abetting liability for employers who provide support or time off for employees to obtain abortions; for medical personnel who advise or assist; for individuals who facilitate; or for health plans that cover the procedure); Kate Elizabeth Queram, *Lyft and Uber Establish Legal Funds to Protect Drivers from Texas Abortion Law*, ROUTE FIFTY (Sept. 7, 2021), <https://www.route-fifty.com/management/2021/09/ride-share-abortion-legal-fund-texas/185154/>; Tim O’Donnell, *Under Texas ban, private citizens could sue a cab driver who takes a woman to an abortion*, THE WEEK (Sept. 1, 2021), <https://theweek.com/science/health/1004413/under-texas-ban-private-citizens-could-sue-a-cab-driver-who-takes-a-woman-to>; R. Alta Charo, *Vigilante Injustice — Deputizing and Weaponizing the Public to Stop Abortions*, NEW ENG. J. MED. (14 Oct. 2021), <https://www.nejm.org/doi/full/10.1056/NEJMp2114886>.

<sup>58</sup> Amanda Zablocki & Mikela T. Sutrina *supra* note 56; Madiba Denney & Jackie Fielding, *Miscarriage of Justice: The Danger of Laws Criminalizing Pregnancy Outcomes* THE BRENNAN CTR. FOR JUSTICE (Nov. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/miscarriage-justice-danger-laws-criminalizing-pregnancy-outcomes>.

<sup>59</sup> Daniel Grossman et. al., *Care Post-Roe: Documenting cases of poor-quality care since the Dobbs decision*, ADVANCING NEW STANDARDS IN REPROD. HEALTH (May 2023), <https://www.ansirh.org/sites/default/files/2023-05/Care%20Post-Roe%20Preliminary%20Findings.pdf#page=8> (the reporting did not specify the state in which the provider practiced, in order to preserve their confidentiality).

<sup>60</sup> *Idaho governor signs ban on ‘abortion trafficking’*, NPR (Apr. 6, 2023), <https://www.pbs.org/newshour/politics/idaho-governor-signs-ban-on-abortion-trafficking>.

<sup>61</sup> Rachel M. Cohen, *The coming legal battles of post-Roe America*, VOX (June 27, 2022), <https://www.vox.com/2022/6/27/23183835/roe-wade-abortion-pregnant-criminalize>.

have banned abortion have proposed legislation to “allow private citizens to sue anyone who helps a resident of that state... terminate a pregnancy outside the state.”<sup>62</sup> Missouri lawmakers introduced a bill in 2021 that claimed jurisdiction over any pregnancy conceived within the state or where the parents were Missouri residents.<sup>63</sup> Alabama’s attorney general recently filed a motion claiming the right to prosecute anyone assisting or funding interstate travel for abortion under conspiracy laws.<sup>64</sup> Some local jurisdictions in Texas have also passed “anti-trafficking” ordinances to restrict the use of city or county roads to travel for abortion access.<sup>65</sup> These travel restrictions expand the threat of prosecution beyond providers practicing in restrictive states, creating uncertainty for providers<sup>66</sup> even in states where abortions remain legal, and infringing on the freedom of movement.

### *Violating Privacy of All Who Can Become Pregnant*

Because many states now criminalize abortion, law enforcement officials are using electronic data to prosecute patients or those who help them access abortion.<sup>67</sup> This personal information is wide in scope and may include:

- location data to show if someone visited an abortion clinic, substance use disorder treatment center, or other health facility;
- search histories on medication abortion, clinics, and general information on abortion;
- menstrual cycle tracking applications; and

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<sup>62</sup> Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (June 30, 2022), <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/>. For specifics on the Missouri proposal, see Alice Miranda Ollstein & Megan Messerly, *Missouri wants to stop out-of-state abortions. Other states could follow*, POLITICO (Mar. 19, 2022), <https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539>.

<sup>63</sup> M.O. SB603, 101st Gen. Assemb., Reg. Sess. (2021). While the law was not adopted, another bill introduced in Missouri last year is intended to allow private individuals to sue Missouri residents whom they suspect of leaving the state to seek abortion care. See Rachel M. Cohen, *supra* note 61. See also Summer Ballentine & John Hanna, *Missouri considers law to make illegal to ‘aid or abet’ out-of-state abortion*, PBS (Mar. 16, 2022), <https://www.pbs.org/newshour/politics/missouri-considers-law-to-make-illegal-to-aid-or-abet-out-of-state>.

<sup>64</sup> “Though abortion may be legal elsewhere, it is plainly illegal pursuant to Ala. Code § 13A-4-4 for Plaintiffs to conspire with others to procure abortions that would be illegal in Alabama. The criminal conduct is the agreement (the conspiracy) itself, which is conduct that occurs in Alabama that Alabama has every right to prosecute. Thus, the legality of abortion in other States is irrelevant to whether Alabama can prosecute a conspiracy formed in Alabama.” See Amy Yurkanin, *supra* note 34.

<sup>65</sup> Caroline Kitchener, *Highways are the Next Antiabortion Target. One Texas Town is Resisting.*, WASH. POST (Sept. 1, 2023), <https://www.washingtonpost.com/politics/2023/09/01/texas-abortion-highways/>.

<sup>66</sup> Terry Gross, *The U.S. faces ‘unprecedented uncertainty’ regarding abortion law, legal scholar says*, NPR (updated Jan. 18, 2023), <https://www.npr.org/sections/health-shots/2023/01/17/1149509246/the-u-s-faces-unprecedented-uncertainty-regarding-abortion-law-legal-scholar-say>; Thor Benson, *Interstate Travel Post-Roe Isn’t as Secure as You May Think*, WIRED (July 25, 2022), <https://www.wired.com/story/insterstate-travel-abortion-post-roe/>.

<sup>67</sup> See, e.g., Cat Zakrzewski et. al., *Texts, web searches about abortion have been used to prosecute women*, WASH. POST (July 3, 2022), <https://www.washingtonpost.com/technology/2022/07/03/abortion-data-privacy-prosecution/>. See also Ross Williams, *How might law enforcement use digital tracking to enforce Georgia’s strict anti-abortion law?*, GPB (Aug. 30, 2022), <https://www.gpb.org/news/2022/08/30/how-might-law-enforcement-use-digital-tracking-enforce-georgias-strict-anti>.

- communications data such as text messages about pregnancy and abortion.<sup>68</sup>

The pre-*Dobbs* case of Latice Fisher, who was charged with second-degree murder after a stillbirth when investigators found the words “mifepristone” and “misoprostol” in her phone’s search history, shows how these tactics were used even while *Roe* was still in force.<sup>69</sup> The Nebraska woman and her mother mentioned above<sup>70</sup> were prosecuted on the basis of Facebook messages about accessing abortion pills.<sup>71</sup> Now that abortion is explicitly criminalized in many states, law enforcement’s use of digital surveillance to track abortions is likely to increase.

## Impacts of Abortion Bans on the Health and Lives of Pregnant Persons

The onslaught of legislative abortion restrictions in the US denies the decisional and bodily autonomy of women, girls, and all people who can become pregnant in a way that rejects their agency, dignity, and equality.<sup>72</sup> The lack of access to safe abortions — and consequent poor health outcomes and increases in maternal mortality<sup>73</sup> — in the US implicates a range of rights under the ICCPR, including the right to life, the right to be free from torture and other ill-treatment, the right to privacy, and the right to be free from discrimination.

Even before *Dobbs*, the US had the highest maternal mortality rate amongst all wealthy countries<sup>74</sup> and rates have worsened in recent years: there were 32.9 deaths per 100,000 live births in 2021, compared to

<sup>68</sup> See Kylie Cheung, *Abortion in the Surveillance State*, JEZEBEL (Nov. 22, 2021), <https://jezebel.com/abortion-in-the-surveillance-state-1848076906>. See also Jon Schuppe, *Police sweep Google searches to find suspects. The tactic is facing its first legal challenge*, NBC NEWS (June 30, 2022), <https://www.nbcnews.com/news/us-news/police-google-reverse-keyword-searches-rcna35749>.

<sup>69</sup> Patricia Hurtado & Francesca Maglione, *In a Post-Roe World, More Miscarriage and Stillbirth Prosecutions Await Women*, BLOOMBERG (July 5, 2022), <https://www.bloomberg.com/news/articles/2022-07-05/miscarriage-stillbirth-prosecutions-await-women-post-roe>. See also Lauren Rankin, *How an online search for abortion pills landed this woman in jail*, FAST CO. (Feb. 26, 2020), <https://www.fastcompany.com/90468030/how-an-online-search-for-abortion-pills-landed-this-woman-in-jail>.

<sup>70</sup> *Supra* at 8.

<sup>71</sup> Susan Rinkunas, *supra* note 41.

<sup>72</sup> “States parties are responsible for ensuring the equal enjoyment of rights without any discrimination. Articles 2 and 3 mandate States parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions, both in the public and the private sector, which impair the equal enjoyment of rights.” Human Rts. Comm, General Comment 28 on the equality of rights between men and women, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) [hereinafter “HRC General Comment 28”]; The Working Grp. on discrimination against women and girls has emphasized that “the right to safe termination of pregnancy is an equality right for women.” Working Grp. on discrimination against women and girls in law and practice, *supra* note 25.

<sup>73</sup> Donna L. Hoyert, *Maternal mortality rates in the United States, 2021*, NAT’L CTR. FOR HEALTH STATISTICS (Mar. 16, 2023), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2021/maternal-mortality-rates-2021.htm> (Maternal death is defined by the Centers for Disease Control and Prevention (CDC) as ‘the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and the site of the pregnancy, from any cause related to or aggravated by the pregnancy of its management, but not from accidental or incidental cause.’) (Note: This definition uses ‘women’ but should be interpreted to include all people who can become pregnant.)

<sup>74</sup> *Id.*; see also Roosa Tikkanen et al., *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, THE COMMONWEALTH FUND (Nov. 18, 2020) <https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries>.



23.8 in 2020 and 20.1 in 2019.<sup>75</sup> For Black women in 2021, the rate was 69.9 deaths per 100,000 live births, 2.6 times the rate for white women.<sup>76</sup> The states with some of the harshest abortion restrictions also have some of the highest rates of maternal mortality (Arkansas, Mississippi, Tennessee, and Alabama), between 41.4 and 43.5 deaths per 100,000 live births.<sup>77</sup>

The correlation of abortion restrictions with lack of access to maternal healthcare has generated “maternal care deserts” — areas of the country where pregnant people cannot access maternal care or abortion.<sup>78</sup> More than 1.7 million women (nearly 3% of women of reproductive age in the US) live in a county without access to abortion and with no access to maternity care. 3.7 million live without access to abortion and with no or low access to maternity care.<sup>79</sup> Experts in maternal mortality expect the situation to worsen as providers leave areas where they cannot legally provide comprehensive pregnancy-related care.<sup>80</sup> A pregnant person in one of these maternal care deserts “may have to continue a dangerous pregnancy or one they don’t want, and may also struggle to find the care they need during that pregnancy and delivery.”<sup>81</sup> Doctors attest that these maternal care deserts, coupled with the confusion and penalties that abortion bans create, will increase the already dismal maternal mortality rate<sup>82</sup> in the US.<sup>83</sup>

Restricting access to abortion services endangers pregnant people’s lives by driving some to resort to unsafe abortions, prolonging high-risk pregnancies (including, in some cases, forcing life-threatening births), increasing risk of domestic violence,<sup>84</sup> and causing pregnant people to delay or forgo essential healthcare due to fear of liability.<sup>85</sup> In addition, research has demonstrated that being denied a wanted abortion can lead to a broad range of long-lasting physical and mental health consequences.<sup>86</sup>

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<sup>75</sup> Donna L. Hoyert *supra* note 73.

<sup>76</sup> *Id.*

<sup>77</sup> Madelyn Amos, *CDC releases new report on national maternal mortality rates*, FEMINIST MAJORITY FOUND. (June 20, 2023), <https://feminist.org/news/cdc-releases-new-report-on-national-maternal-mortality-rates/>.

<sup>78</sup> See Eugene Declercq et al., *The U.S. Maternal Health Divide: The Limited Maternal Health Services and Worse Outcomes of States Proposing New Abortion Restrictions*, THE COMMONWEALTH FUND (Dec. 14, 2022), <https://www.commonwealthfund.org/publications/issue-briefs/2022/dec/us-maternal-health-divide-limited-services-worse-outcomes>.

<sup>79</sup> Nicole Wetsman et. al., *supra* note 7.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Selena Simmons-Duffin & Carmel Wroth, *Maternal deaths in the U.S. spiked in 2021, CDC reports*, NPR (Mar. 16, 2023), <https://www.npr.org/sections/health-shots/2023/03/16/1163786037/maternal-deaths-in-the-u-s-spiked-in-2021-cdc-reports>

<sup>83</sup> An Idaho maternal-fetal health expert who specializes in high-risk pregnancies stated: “I have no doubt that the mortality rate will rise.” Randi Kaye & Stephen Samaniego, *supra* note 11.

<sup>84</sup> Sarah Roberts et al., *Risk of violence from the man involved in the pregnancy after receiving or being denied an abortion* 12 BMC MED 144 (Sept. 29, 2014) (explaining that women denied an abortion remain tethered to abusive partners and at risk for continued violence, even if they leave the relationship).

<sup>85</sup> See Amanda Jean Stevenson et. al., *The maternal mortality consequences of losing abortion access* (June 29, 2022), <https://osf.io/preprints/socarxiv/7g29k>.

<sup>86</sup> ANSIRH, *The Turnaway Study*, UCSF <https://www.ansirh.org/research/ongoing/turnaway-study> (accessed Sept. 06, 2023).

Numerous examples of these devastating health impacts have been documented in the first year since *Dobbs*. In July 2022, a woman had to travel hundreds of miles to a different state for a lifesaving abortion. Though she was experiencing an ectopic pregnancy (a leading cause of maternal mortality in early pregnancy),<sup>87</sup> her doctor would not end the pregnancy because he was “worried that the presence of a fetal heartbeat meant treating her might run afoul of new restrictions on abortion.”<sup>88</sup> A woman in Tennessee experiencing placenta accreta, in which the placenta grows into the uterine wall and can cause serious complications, was told that under Tennessee’s ban, doctors could only provide the abortion care she needed if her life was in danger. Unable to take time off work to travel to a different state for an abortion, she was forced to continue the pregnancy until December 2022, when she had a cesarean delivery and an emergency hysterectomy to save her life.<sup>89</sup> This permanent loss of fertility could have been avoided through timely abortion care in her home state. In Wisconsin, hospital staff would not remove fetal tissue for a patient with an incomplete miscarriage for fear that it would violate that state’s abortion ban. The patient was left to bleed at home for more than 10 days.<sup>90</sup>

Such delays in care can lead to hemorrhaging and life-threatening sepsis,<sup>91</sup> and potentially impact future fertility.<sup>92</sup> Delayed care can also cause serious psychological suffering and trauma for individuals and families already dealing with pregnancy loss.<sup>93</sup>

A woman in Ohio described her experience being forced to travel to receive abortion care after the state imposed a six-week ban:<sup>94</sup>

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<sup>87</sup> See *7 things to know about ectopic pregnancy*, U.C. DAVIS HEALTH (Mar. 22, 2022), <https://health.ucdavis.edu/news/headlines/7-things-to-know-about-ectopic-pregnancy/2022/05>; Josie L. Tenore, *Ectopic Pregnancy*, 61 AM. FAM. PHYSICIAN 4 (2000).

<sup>88</sup> Frances Stead Sellers & Fenit Nirappil, *Confusion post-Roe spurs delays, denials for some lifesaving pregnancy care*, WASH. POST (16 July 16, 2022), <https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care/>

<sup>89</sup> Nadine El-Bawab, *Tennessee woman gets emergency hysterectomy after doctors deny early abortion care*, ABC NEWS (May 31, 2023), <https://abcnews.go.com/US/tennessee-woman-gets-emergency-hysterectomy-after-doctors-deny/story?id=99457461>.

<sup>90</sup> Frances Stead Sellers & Fenit Nirappil, *supra* note 88.

<sup>91</sup> See Pam Belluck, *They Had Miscarriages, and New Abortion Laws Obstructed Treatment*, N.Y. TIMES (July 17, 2022), <https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html>. See also Ashley Redinger & Hao Nguyen, INCOMPLETE ABORTIONS, <https://www.ncbi.nlm.nih.gov/books/NBK559071/#article-17039.s10> [hereinafter “INCOMPLETE ABORTIONS”] (describing “complications that can arise after the management of incomplete abortion including death, uterine rupture, uterine perforation, subsequent hysterectomy, multisystem organ failure, pelvic infection, cervical damage, vomiting, diarrhea, infertility, and/or psychological effects.”).

<sup>92</sup> *Id.* See also, Daniel Grossman et. al., *supra* note 59.

<sup>93</sup> See Rosemary Westwood, *Bleeding and in pain, she couldn't get 2 Louisiana ERs to answer: Is it a miscarriage?*, NPR (Dec. 29, 2022), <https://www.npr.org/sections/health-shots/2022/12/29/1143823727/bleeding-and-in-pain-she-couldnt-get-Louisiana-ers-to-answer-is-it-a-miscarria>.

<sup>94</sup> On June 27, 2022, Ohio began enforcing its 6-week LMP abortion ban following the U.S. Supreme Court’s decision to overturn *Roe v. Wade* in the case *Dobbs v. Jackson Women’s Health Organization*. This law is currently subject to a preliminary injunction and is not in effect. *After Roe Fell: Abortion Laws by State - Ohio*, CTR. FOR REPROD. RTS. <https://reproductiverights.org/maps/state/ohio/> (last visited Sept. 6, 2023).

At my 12-week scan, my baby was found to have brain and heart defects, and we were eventually given a diagnosis of Trisomy 13 and a fatal prognosis. Carrying a baby to term comes with many risks and unknowns at my age (40) and I simply couldn't imagine giving birth just to watch my baby die within a few hours; I wanted to save my child from ever having to suffer. So I decided to have an abortion. However abortions had just become illegal in Ohio (June 2022), and as a result I had to travel several states away to obtain one. It was devastating to get a fatal prognosis, but the trauma and toll on my mental health from having to travel for an abortion has been life altering...I had to leave my doctor, whom I know and trust, and have a stranger perform my procedure. And in the weeks it took to schedule, my baby continued to grow and get sicker. This experience is something I will never recover from.<sup>95</sup>

An abortion provider in Idaho described her experience treating a patient who had been forced to visit three hospitals and travel hundreds of miles for a medically necessary abortion, putting her health and life at risk, because other providers refused to care for her.<sup>96</sup> Her physicians told her that all abortions were already illegal in Idaho (although the Idaho ban had not yet gone into effect),<sup>97</sup> and despite a dangerous pregnancy complication leading to chills, cramping, and risk of sepsis. The provider explained:

Within a few hours of her arrival, [the patient] developed a high fever and IV antibiotics were started. She delivered the fetus about five hours after the induction of labor began, however the placenta was retained in her uterus. She started bleeding heavily so she was taken to the operating room to remove the placenta and manage the hemorrhage. She required a blood transfusion and a three-day hospital stay for monitoring and IV antibiotics due to the infection.<sup>98</sup>

The 70 abortion seekers and providers — including this Idaho provider and the Ohio woman quoted above — who shared their experiences with the authors of this report illustrate the grim health impacts of abortion bans.<sup>99</sup> Their testimony echoes public reporting on poor-quality care for pregnant people since *Dobbs*, including 50 submissions from health care providers “describing detailed cases of care that deviated from the usual standard due to new laws restricting abortion.”<sup>100</sup> These testimonies recount

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<sup>95</sup> Testimony of abortion seeker, submitted to ORJ (May 2023) (on file with authors).

<sup>96</sup> The patient sought care on or around August 18, 2022, approximately one week before the Idaho ban came into force. Kelcie Moseley-Morris, *Idaho's abortion trigger ban clock starts now — ban will take effect Aug. 25*, IDAHO CAP. SUN (July 26, 2023), <https://idahocapitalsun.com/briefs/idahos-abortion-trigger-ban-clock-starts-now-ban-will-take-effect-aug-25/>.

<sup>97</sup> See also *infra*, *Chilling Effects and Deadly Consequences of Exceptions-Based Abortion Restrictions*, 19.

<sup>98</sup> Testimony of abortion provider, submitted to ORJ (May 2023) (on file with authors).

<sup>99</sup> Testimonies of abortion seekers and providers, submitted to ORJ (May 2023) (on file with authors).

<sup>100</sup> Daniel Grossman et. al., *supra* note 59.

pregnant persons undergoing blood transfusions, surgeries, and intubation because abortion care could or would not be provided in states with abortion bans.<sup>101</sup> Some patients were denied pain medication during a miscarriage because their medical providers were afraid it could constitute “aiding and abetting an abortion.” Others were forced to travel for hours out of state to find abortion care. One patient, pregnant with twins, experienced the spontaneous demise of one fetus and then developed complications “which, prior to *Dobbs*, would have been treated by ending the pregnancy.”<sup>102</sup> However, due to a state abortion ban, the patient required transport to another state. Her physician noted: “[The patient’s] condition worsened during the duration of transport time. The patient was separated from family and resources. Astronomic hospital costs... This delay in care was a ‘near-miss’ and increased morbidity.”<sup>103</sup>

Restricting abortion is also connected to an increased risk of domestic violence. Since *Dobbs*, the National Domestic Violence Hotline reported “a 99% increase in calls from people saying their partners are trying to control their reproductive choices.”<sup>104</sup> In May 2023, a Texas woman was killed by her ex-boyfriend hours after returning from Colorado, where she had traveled to obtain an abortion.<sup>105</sup> A police investigator wrote that the suspect, with whom the woman had recently ended a relationship, killed her because he did not want her to end her pregnancy.<sup>106</sup> Abortion bans can also be deployed as a tool of domestic abuse.<sup>107</sup> A Texas man attempted to sue three of his ex-wife’s friends for allegedly helping her obtain pills to self-manage an abortion, a suit contemplated under Texas’s privately-enforced SB8 prohibition.<sup>108</sup> Subsequent court filings allege that the man was “a serial emotional abuser” who was using the lawsuit to retain control over his ex-wife.<sup>109</sup>

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<sup>101</sup> *Id.*; see also, testimonies of abortion seekers and providers, submitted to ORJ (May 2023) (on file with authors).

<sup>102</sup> Daniel Grossman et. al., *supra* note 59.

<sup>103</sup> *Id.*

<sup>104</sup> Kylie Cheung, *Domestic Violence Hotline Reports 99% Increase in Calls Post-Roe*, JEZEBEL (July 14, 2023), <https://jezebel.com/domestic-violence-hotline-reports-99-increase-in-calls-1850641660>. For more on the link between abortion restrictions and domestic violence, see Global Justice Center et. al., *Submission to the United Nations Committee on the Elimination of Racial Discrimination* at 3 (Aug. 2022), [https://globaljusticecenter.net/files/SBRWI\\_HRW\\_GJC\\_AI\\_CERDShadowReport.pdf](https://globaljusticecenter.net/files/SBRWI_HRW_GJC_AI_CERDShadowReport.pdf)

<sup>105</sup> Emily Olson, *A Texas woman was killed by her boyfriend after getting an abortion, police say*, NPR (May 13, 2023), <https://www.npr.org/2023/05/13/1176007305/texas-abortion-woman-killed-boyfriend>.

<sup>106</sup> *Id.* See also Andrea Blanco, *A pregnant woman reported her boyfriend’s abuse. He wasn’t arrested until after her murder over an abortion*, THE INDEPENDENT (May 16, 2023),

<https://www.independent.co.uk/news/world/americas/crime/gabriella-gonzalez-murder-abortion-texas-b2339927.html>

<sup>107</sup> *Litigation Abuse*, WOMENSLAW.ORG (last visited Sept. 6, 2023), <https://www.womenslaw.org/about-a-buse/forms-abuse/litigation-abuse>.

<sup>108</sup> Eleanor Klibanoff, *Three Texas women are sued for wrongful death after allegedly helping friend obtain abortion medication*, THE TEX. TRIBUNE (Mar. 10, 2023), <https://www.texastribune.org/2023/03/10/texas-abortion-lawsuit/>.

<sup>109</sup> Andrea González-Ramírez, *Texas Man Who Sued Over Ex-Wife’s Abortion Is ‘Serial Emotional Abuser’*, THE CUT (May 4, 2023), <https://www.thecut.com/2023/05/texas-man-suing-over-ex-wifes-abortion-is-accused-of-abuse.html>; see also Moira Donegan & Mark Joseph Stern, *Not Every Man Will Be As Dumb As Marcus Silva*, SLATE (May 4, 2023) <https://slate.com/news-and-politics/2023/05/texas-man-medication-abortion-lawsuit-backfired-explained.html>.

In short, current abortion restrictions pose risks to the life and health of pregnant people. For many, not being able to terminate a pregnancy in a timely manner could mean risking their lives and facing life-long physical and mental repercussions.

## Chilling Effects and Deadly Consequences of Exceptions-Based Abortion Restrictions

States with complete abortion bans generally have a legal exception to save the life of a pregnant person.<sup>110</sup> Some of these states also include exceptions for cases of rape, incest, or fetal anomaly.<sup>111</sup> However, this exceptions-based framework has proven impossible to implement, forcing the continuation of pregnancies caused by rape or incest, or that threaten the life or health of a pregnant person.<sup>112</sup> Indeed, reporting since *Dobbs* confirms, “very few women have been allowed to receive abortions under exceptions.”<sup>113</sup> In short, as the Committee has recognized in other contexts,<sup>114</sup> abortion access that depends on meeting pre-specified exceptions will predictably result in denials of care even for those who meet the narrow exceptions, due to the chilling effect of bans and reductions in access.<sup>115</sup>

US abortion restrictions that rely on narrow exceptions implicate a range of rights under the ICCPR, including the right to life, to be free from torture and other ill-treatment, to privacy, and to be free from discrimination. This Committee has made clear that restrictions on — or barriers to, whether *de jure* or *de facto* — access to abortion in cases of rape, incest, fetal anomaly, or to protect the life or health of the pregnant person violate the right to be free from torture and other cruel, inhuman, or degrading treatment (CIDT) under ICCPR Article 7,<sup>116</sup> and that this protection “relates not only to

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<sup>110</sup> See Amy Schoenfeld Walker, ‘We don’t do that here.’, N.Y. TIMES (Jan. 21, 2023), <https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Kate Zernike, *Five Women Sue Texas Over the State’s Abortion Ban*, N.Y. TIMES (Mar. 6, 2023), <https://www.nytimes.com/2023/03/06/us/texas-abortion-ban-suit.html> (citing Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted*, N.Y. TIMES (Jan. 21, 2023), <https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html>.)

<sup>114</sup> See Human Rts. Comm., Concluding Observations of the Human Rights Committee: Guatemala, UN Doc. CCPR/CO/72/GTM (2001); Human Rts. Comm., Concluding observations of the Human Rights Committee: The Gambia, UN Doc. CCPR/CO/75/GMB (2004).

<sup>115</sup> See also, European Court of Human Rights, *Tysiac v Poland*, App. No. 5410/03 (2007), para. 116. (The Court noted that in Poland, “the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility... can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case... Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.”) Accord, *Amnesty International’s policy on abortion: explanatory note*, AMNESTY INT’L (Sept. 28, 2020), <https://www.amnesty.org/en/documents/pol30/2847/2020/en/>. See also *supra*, *Impacts of Abortion Bans on the Health and Lives of Pregnant Persons*, 14.

<sup>116</sup> See *K.L. v. Peru*, ¶ 6.3, U.N. Doc. CCPR/C/85/D/1153/2003 (2005) [hereinafter “*K.L. v. Peru*”]; *Mellet v. Ireland*, ¶¶7.4-7.6, U.N. Doc. CCPR/C/116/D/2334/2013 (2016) [hereinafter “*Mellet v. Ireland*”]; *Whelan v. Ireland*, ¶¶7.4-7.7, U.N. Doc. CCPR/C/119/D/2425/2014 (2017) [hereinafter “*Whelan v. Ireland*”].

acts that cause physical pain but also to acts that cause mental suffering.”<sup>117</sup>

An exceptions-based framework for abortion access presents multiple violations of rights. At a basic level, even where they exist in law, exceptions are narrow, unworkable, and difficult to implement, as their terms do not necessarily correspond with medical diagnoses, sometimes exclude health-threatening conditions, and lack detail on how to access care under an exception. For example, a Louisiana woman was denied an abortion in by a hospital after her fetus was diagnosed with acrania – developing without a skull – a condition considered “uniformly fatal in the perinatal period.”<sup>118</sup> Because acrania did not appear on a state list of conditions considered to render a fetus “medically futile,” Louisiana doctors declined to perform the abortion. In Texas, a judge briefly enjoined enforcement of the state’s abortion bans after 15 patients and providers sued for clarification of the exception regime.<sup>119</sup> The patients had experienced a range of excruciating pregnancy complications and outcomes<sup>120</sup> as a result of being denied care despite seemingly qualifying for exceptions.<sup>121</sup> Particularly in the hostile climate prevailing in states enacting bans, an exceptions-based framework can be expected to result in denied abortion care where a patient’s suffering is considered “insufficient” or “not qualified” for an exception.<sup>122</sup>

Similarly, exceptions for rape or incest (where they exist)<sup>123</sup> may require abuse to be reported to law

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<sup>117</sup> L.M.R. v. Argentina, ¶ 9.2, U.N. Doc. CCPR/C/101/D/1608/2007 (2011) [hereinafter “L.M.R. v. Argentina”]; *see also* HRC General Comment 36, ¶ 8 (“States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable.”).

<sup>118</sup> Emily Woodruff, *Louisiana hospital denies abortion for fetus without a skull*, NOLA.COM (Aug. 17, 2022), [https://www.nola.com/news/healthcare\\_hospitals/article\\_d08b59fe-1e39-11ed-a669-a3570eed885.html](https://www.nola.com/news/healthcare_hospitals/article_d08b59fe-1e39-11ed-a669-a3570eed885.html)

<sup>119</sup> The injunction was quickly blocked as the state attorney general appealed the case to the Texas supreme court; the bans are currently in force. Selenia Simmons-Duffin, *What just happened when Texas' abortion bans briefly lifted — and what comes next*, NPR (Aug. 8, 2023), <https://www.npr.org/2023/08/08/1192750247/what-just-happened-when-texas-abortion-bans-briefly-lifted-and-what-comes-next>

<sup>120</sup> These include emergency surgery, possible loss of future fertility, and being forced to carry to term fetuses with fatal conditions. *The Plaintiffs and Their Stories: Zurawski v. State of Texas*, CTR. FOR REPROD. RTS. (Mar. 23, 2023), <https://reproductiverights.org/zurawski-v-texas-plaintiffs-stories-remarks/>; *See also* Zurawski et al. v. State of Texas; Attorney General of Texas, Texas Medical Board, *Plaintiffs’ First Amended Verified Petition for Declaratory Judgment and Application for Temporary and Permanent Injunction*, No. D-1-GN-23-000968, <https://reproductiverights.org/wp-content/uploads/2023/05/2023.05.22-Zurawski-v-Texas-1st-Am-Ver-Pet-FINAL.pdf>.

<sup>121</sup> On August 4, a judge briefly enjoined enforcement of Texas’s bans due to their unclear terms and the “related threat of enforcement” which created a risk that doctors “will have no choice but to bar or delay the provision of abortion care to pregnant people in Texas for whom an abortion would prevent or alleviate a risk of death or risk to their health.” However, the state’s attorney general appealed the decision within hours, leading to the reinstatement of the bans.

<sup>122</sup> *See* Fabiola Cineas, *Rape and incest abortion exceptions don’t really exist*, VOX (July 22, 2022), <https://www.vox.com/23271352/rape-and-incest-abortion-exception> (quoting head of National Right to Life on the 10 year old in Ohio: “She would have had the baby, and as many women who have had babies as a result of rape, we would hope that she would understand the reason and ultimately the benefit of having the child.”)

<sup>123</sup> *Id.*; *see also* Amy Schoenfeld Walker, *supra* note 110.

enforcement to permit access to abortion care — despite the well-documented barriers to and low rates of reporting.<sup>124</sup> Other bans do not specify any process at all to qualify for an exception. For example, a 12-year-old rape victim in Mississippi was unable to access care, demonstrating that even where a victim files a police report, “these exceptions are largely theoretical..., there appears to be no clear process for granting an exception.”<sup>125</sup>

As noted above, many pregnant people have been denied care or faced delays due to the technicalities of exceptions. In Florida, a woman was forced to carry her pregnancy to term after her fetus was diagnosed with a fatal condition after 15 weeks, because Florida’s 15-week ban required that “two physicians certify in writing that, in reasonable medical judgment, the fetus has a fatal fetal abnormality” and had not reached viability in order to obtain an exception to the ban.<sup>126</sup> Unable to secure this certification, she was eventually told she would have to wait two months to terminate her pregnancy, only to be told at a later appointment that she could not terminate.<sup>127</sup> Unable to travel to access care, she was forced to carry the pregnancy to term.<sup>128</sup> She gave birth in March 2023; her baby lived for 99 minutes.<sup>129</sup>

Similarly, an abortion seeker from Oklahoma detailed her experience:

I was 22 weeks pregnant when my anatomy scan found out my son would be born with anencephaly. I wanted an abortion but wasn’t allowed one in my state.<sup>130</sup> I was forced to carry to term a baby with no brain nor chance of survival.<sup>131</sup>

More fundamentally, the combination of the uncertainty inherent in any medical care with the severe criminal penalties for violating bans<sup>132</sup> creates a “chilling effect” that causes the majority of providers to

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<sup>124</sup> Fabiola Cineas, *id.*; see also *The Criminal Justice System: Statistics*, RAINN (Last visited Sept. 6, 2023), <https://www.rainn.org/statistics/criminal-justice-system>.

<sup>125</sup> “The state Attorney General’s office did not return TIME’s repeated requests to clarify the process for granting exceptions; the Mississippi Board of Medical Licensure and the Mississippi State Medical Association did not reply to TIME’s requests for explanation.” Charlotte Alter, *She Wasn’t Able to Get an Abortion. Now She’s A Mom. Soon She’ll Start 7th Grade.*, TIME (Aug. 14, 2023), <https://time.com/6303701/a-rape-in-mississippi/>

<sup>126</sup> Frances Stead Sellers, *Her baby has a deadly diagnosis. Her Florida doctors refused an abortion*, WASH. POST (Feb. 18, 2023, updated May 19, 2023), <https://www.washingtonpost.com/health/2023/02/18/florida-abortion-ban-unviable-pregnancy-potter-syndrome/>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Frances Stead Sellers et. al., *The short life of Baby Milo*, WASH. POST (May 19, 2023), <https://www.washingtonpost.com/health/interactive/2023/florida-abortion-law-deborah-dorbert/>.

<sup>130</sup> Oklahoma’s abortion bans do not include an exception for fatal fetal anomalies. Mabel Felix et. al., *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KAISER FAM. FOUND. (May 18, 2023), <https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services/>

<sup>131</sup> Testimony of abortion seeker, submitted to ORJ (May 2023) (on file with authors).

<sup>132</sup> See *supra*, *Criminalization and Penalization*, 4.

steer clear of providing any care that could expose them to liability.<sup>133</sup> This predictably results in increased, prolonged pain and suffering for patients and arbitrary denials of care, neither of which can be resolved with technical clarifications of the exceptions. Medical professionals report that under the increasingly restrictive legal landscape, they are generally unsure whether and when medically necessary, even lifesaving, abortions are legal. They note that such uncertainty causes healthcare providers and institutions to delay or deny abortion and other reproductive healthcare.<sup>134</sup> A recent investigation found, for example, that “Not a single hospital in Oklahoma appeared to be able to articulate clear, consistent policies for emergency obstetric care that supported their clinicians’ ability to make decisions based solely on their clinical judgment and pregnant patients’ stated preferences and needs.”<sup>135</sup>

The confusion inherent in the exceptions-based framework chills even permitted conduct, causing severe physical pain, mental suffering, and arbitrary denials or delays in care. As alluded to above, numerous pregnant people have been told they would need to delay care until they were sick enough to justify treatment, in some cases leaving them with permanent harm. In Oklahoma, one woman experienced a cancerous type of molar pregnancy, which does not develop into a viable fetus and in her case carried a risk of hemorrhage and death. The hospital she went to told her she could not be treated “unless [she was] crashing ... or [her] blood pressure goes so high that [she was] fixing to have a heart attack.”<sup>136</sup> Ultimately she was forced to travel out of state to access an abortion.<sup>137</sup> In Texas,<sup>138</sup> a woman “was told she was not yet sick enough to receive an abortion, then twice became septic, and was left

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<sup>133</sup> “Physicians say that they cannot anticipate all of the ways in which pregnancy can go awry and that lawmakers were wrong to assume they could. Requiring doctors to pause their care to seek legal counsel puts patients’ lives at risk, they say.” Amy Schoenfeld Walker, *supra* note 117.

<sup>134</sup> See generally Sens. Elizabeth Warren et. al., *Post-Roe Abortion Bans Threaten Women’s Lives: Health Care Providers Speak Out on the Devastating Harm Posed by Abortion Bans and Restrictions* (Oct. 2022), <https://www.warren.senate.gov/imo/media/doc/Abortion%20Care%20Oversight%20Report1.pdf>. See also Tessa Weinberg & Allison Kate, *Missouri doctors fear vague emergency exception to abortion ban puts patients at risk*, MO. INDEP. (July 2, 2022), <https://missouriindependent.com/2022/07/02/missouri-doctors-fear-vague-emergency-exception-to-abortion-ban-puts-patients-at-risk/>.

<sup>135</sup> Christian De Vos et. al., *No One Could Say: Accessing Emergency Obstetrics Information as a Prospective Prenatal Patient in Post-Roe Oklahoma*, PHYSICIANS FOR HUM. RTS, OKLA. CALL FOR REPROD. JUSTICE, & THE CTR. FOR REPROD. RTS (Apr. 25, 2023), <https://pfr.org/our-work/resources/oklahoma-abortion-rights/>. Similarly, out of eight Indiana hospitals surveyed after that state’s ban went into effect, only one did not immediately rule out providing abortion care for rape victims — which is permitted under the state’s ban until 10 weeks — but provided no details on how patients could access the care. See Leslie Bonilla Muñiz, *Hospitals close-lipped on post-rape abortion policies*, IND. CAP. CHRON. (Aug. 30, 2023), <https://indianacapitalchronicle.com/2023/08/30/hospitals-close-lipped-on-post-rape-abortion-policies/>.

<sup>136</sup> Selena Simmons-Duffin, *In Oklahoma, a woman was told to wait until she’s ‘crashing’ for abortion care*, NPR (Apr. 25, 2023), <https://www.npr.org/sections/health-shots/2023/04/25/1171851775/oklahoma-woman-abortion-ban-study-shows-confusion-at-hospitals>.

<sup>137</sup> *Id.*

<sup>138</sup> “Texas statute bans abortion unless there is “a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy” that places the pregnant woman “at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced.” Kate Zernike, *supra* note 113.



with so much scar tissue that one of her fallopian tubes is permanently closed.”<sup>139</sup> Another Texas woman was forced to deliver a fetus without a complete brain or skull. In an indication of the ongoing trauma caused by the denial of care, this woman became physically ill while recounting her experience on the witness stand in a case seeking clarification of the state’s abortion law.<sup>140</sup> In the Florida case above, the woman reported anxiety and depression as a result of waiting months to terminate her pregnancy, then ultimately being told she could not terminate.<sup>141</sup> These examples demonstrate the direct harms and risks of an exceptions-based framework to access abortion.

Finally, due in part to the lack of clarity in the terms of exceptions, as well as the overall chilling effect of applying criminal penalties to situations of inherent medical uncertainty, providers will exit regions where these restrictions exist to protect themselves from liability and the inability to treat their patients with appropriate medical care.<sup>142</sup> Some providers may cease to provide reproductive care, while others will move their existing practices to other states. Early research on residency applications shows new physicians may be selectively opting out of residency in states with abortion bans.<sup>143</sup> As a result, even patients to whom legal exceptions clearly apply will struggle to find care in their home states. Victims of rape or incest will be forced to continue pregnancies resulting from abuse, and patients with life-threatening pregnancy complications can be expected to die at higher rates, notwithstanding legal “exceptions” to bans.

One abortion provider, a high-risk obstetrician, described her painful decision to leave her home state due to fear of criminalization:

In my community, I was the only provider trained to provide specialized miscarriage and abortion care. I felt compelled to leave my home and my patients because of the abortion restrictions that went into place following the Dobbs decision. In [home state], there is currently a complete abortion ban without any exceptions, not for maternal life,<sup>144</sup> rape, or fetal indications. If I were to perform a life-saving abortion due to a patient hemorrhaging from an ongoing miscarriage, that would be considered a felony under the new law, punishable by

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<sup>139</sup> *Id.*

<sup>140</sup> Caroline Kitchener et. al., *Texas abortion hearing culminates with tension and emotions high*, WASH. POST (July 20, 2023), <https://www.washingtonpost.com/politics/2023/07/20/texas-abortion-ban-hearing/>.

<sup>141</sup> Frances Stead Sellers et. al., *supra* note 129.

<sup>142</sup> See Part 2 on impacts on mortality and health for more.

<sup>143</sup> Kendal Orgera et. al., *Training Location Preferences of U.S. Medical School Graduates Post Dobbs v. Jackson Women’s Health Organization*, ASS’N OF AM. MED. COLL. (Apr. 13, 2023), <https://www.aamc.org/advocacy-policy/aamc-research-and-action-institute/training-location-preferences>; See also Erika Edwards, *Abortion bans could drive away young doctors, new study finds*, NBC NEWS (May 18, 2023), <https://www.nbcnews.com/health/health-news/states-abortion-bans-young-doctors-survey-rcna84899>

<sup>144</sup> The state law allowed physicians who perform life-saving abortions to argue, as an affirmative defense to felony abortion charges, that the abortion was necessary to preserve the life of the pregnant person. The physician bore the burden of proof.

up to 15 years in prison. I sent countless families to [neighboring states] after their water had broken early or they had a lethal anomaly because I couldn't care for them. My own personal threshold was if someone was so infected they were septic or were bleeding to death. That law meant that every family I encountered who had a pregnancy complication, who I had the skill set to take care of, I had to send out of state for evidence-based medical care. Every. Single. Patient. It is terrifying for both patients and providers alike. It became untenable and so my family and I made the excruciating decision to leave and come to [a state with legal abortion] where I could practice medicine and care for the families and mothers that I encounter in a compassionate and safe environment.<sup>145</sup>

These factors combine to make “exceptions” to abortion bans illusory — they provide political cover to those enacting total bans, while offering no relief to abortion seekers.

## Disproportionate Impact on Marginalized Populations

### *People of Color*

US abortion restrictions have a disproportionate impact on marginalized populations, including people of color and youth. These disparate impacts violate the ICCPR right to be free from discrimination on any ground, including race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.<sup>146</sup>

Access to abortion — and to quality healthcare in general — has never been equitable for persons from marginalized communities in the US. For example, Black people have always faced high barriers to accessing healthcare, including abortion.<sup>147</sup> These inequities are the result of compounding structural, institutionalized racial oppression,<sup>148</sup> leading to higher rates of poverty, diminished access to the social safety net (e.g., paid leave), and discrimination within healthcare.<sup>149</sup> *Dobbs* exacerbates many of these

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<sup>145</sup> Testimony of abortion provider, submitted to ORJ (May 2023) (on file with authors).

<sup>146</sup> ICCPR, Art. 26.

<sup>147</sup> Black women may also be particularly impacted by abortion bans because they have historically been overrepresented among people seeking abortions. See David R. Williams et al., *Understanding and Addressing Racial Disparities in Health Care*, 21 HEALTH CARE FIN. REV. 4 (2000). See also Latoya Hill et al., *Key Facts on Health and Health Care by Race and Ethnicity*, KAISER FAM. FOUND. (Mar. 15, 2023), <https://www.kff.org/racial-equity-and-health-policy/report/key-data-on-health-and-health-care-by-race-and-ethnicity/>; Pamela Riley et al., *Closing the Equity Gap in Health Care for Black Americans*, THE COMMONWEALTH FUND (July 15, 2016), <https://www.commonwealthfund.org/blog/2016/closing-equity-gap-health-care-black-americans>. See also *Reported Legal Abortions by Race of Women Who Obtained Abortion by the State of Occurrence*, KAISER FAM. FOUND. (2020), <https://www.kff.org/womens-health-policy/state-indicator/abortions-by-race/>.

<sup>148</sup> See Global Justice Center et al., *Submission to the United Nations Committee on the Elimination of Racial Discrimination*, *supra* note 17.

<sup>149</sup> *Id.*; *A Post-Roe America: The Legal Consequences of the Dobbs Decision*, Hearing before the Senate Committee on the Judiciary, 117th Cong. section IV (2022) (statement of Khiara M. Bridges, Professor of Law, UC Berkeley School of Law), <https://www.judiciary.senate.gov/download/testimony-bridges-2022-07-12>.

inequities by, for example, requiring individuals to travel farther for care. Since people of color are more likely to fall below the poverty line than their white counterparts, they are likely to feel the costs of interstate travel for healthcare particularly acutely. They are also less likely to have paid time off or paid sick leave to allow for travel or recovery if needed, and face additional discrimination to obtain necessary healthcare.<sup>150</sup> Research shows that people of color are disproportionately likely to live in states that have enacted or are newly enforcing abortion bans post-*Dobbs*.<sup>151</sup>

Abortion is also a form of reproductive health care needed by people of color at higher rates than among white people, due in part to lack of access to other forms of reproductive healthcare,<sup>152</sup> as well as higher rates of pregnancy complications requiring termination.<sup>153</sup> Overall, pregnancy and childbearing are more dangerous for people of color, and forced birth and parenthood disproportionately enforces lower socioeconomic status for people of color individually and as a class.<sup>154</sup> One study shows that 70% of OBGYNs say racial and ethnic inequities in maternal health have already worsened since *Dobbs*.<sup>155</sup>

The criminalization of abortion also reinforces racial disparities in the criminal legal system.<sup>156</sup> Communities of color, especially Black communities, are disproportionately impacted by pregnancy criminalization in part because of the heightened, discriminatory policing and surveillance of these

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<sup>150</sup> “Black women have a 53% increased risk of dying in the hospital during childbirth, no matter their income level, type of insurance or other social determinants of health, suggesting systemic racism seriously impacts maternal health, according to an 11-year analysis of more than 9 million deliveries in U.S. hospitals.” Press Release, American Society of Anesthesiologists, Systemic racism plays role in much higher maternal mortality rate among Black women (Oct. 22, 2022),

<https://www.asahq.org/about-asa/newsroom/news-releases/2022/10/systemic-racism-plays-role-in-much-higher-maternal-mortality-rate-among-black-women>. See also Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, 43 AMER. BAR. ASS’N HUM. RTS. MAG. 3 (2018),

[https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-state-of-healthcare-in-the-united-states/racial-disparities-in-health-care](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/racial-disparities-in-health-care).

<sup>151</sup> Katherine Gallagher Robbins et. al., *State Abortion Bans Harm More than 15 Million Women of Color*, NAT’L P’SHP FOR WOMEN AND FAMILIES (June 2023), <https://nationalpartnership.org/report/state-abortion-bans-harm-woc/>

<sup>152</sup> Fabiola Cineas, *Black women will suffer the most without Roe*, VOX (June 29, 2022), <https://www.vox.com/2022/6/29/23187002/black-women-abortion-access-roe>

<sup>153</sup> “In 2019, the abortion rate was 23.8 per 1,000 Black women, 11.7 per 1,000 Hispanic women, 13 per 1,000 Asian American, Native American, and other women—and just 6.6 per 1,000 white women, according to data reported to the Centers for Disease Control and Prevention (CDC).” Zara Abrams, *Abortion bans cause outsized harm for people of color*, 54 MONITOR ON PSYCH. 4 (2023), <https://www.apa.org/monitor/2023/06/abortion-bans-harm-people-of-color> (citing Katherine Kortsmitt et al., *Abortion Surveillance - United States 2019*, 70 Ctrs For Disease Control And Prevention: Surveillance Summaries 9 (2021).

<sup>154</sup> See Global Justice Center et. al., *Submission to the United Nations Committee on the Elimination of Racial Discrimination supra* note 17.

<sup>155</sup> Brittini Frederiksen et. al., *A National Survey of OBGYNs’ Experiences After Dobbs*, KAISER FAM. FOUND. (June 21, 2023), <https://www.kff.org/report-section/a-national-survey-of-obgyns-experiences-after-dobbs-report/>. The impact on maternal mortality and other disparities would likely worsen if a nationwide abortion ban were to go into effect: “Recent estimates suggest that a nationwide abortion ban would increase maternal mortality by 21% overall and by 33% among Black Americans.” Katy Backes Kozhimannil et. al., *Abortion Access as a Racial Justice Issue*, NEW ENG. J. MED. (Oct. 27, 2022), <https://pubmed.ncbi.nlm.nih.gov/36069823/> (citing Amanda Jean Stevenson, *The pregnancy-related mortality impact of a total abortion ban in the United States: A Research Note On Increased Deaths Due To Remaining Pregnant*, 58 DEMOGRAPHY 6 (2021).

<sup>156</sup> See *supra*, *Criminalization and Penalization*, 4.

communities, often under the auspices of the “war on drugs.”<sup>157</sup> In addition, BIPOC, particularly Black women, are more likely to suffer miscarriages,<sup>158</sup> which are generally indistinguishable from medically induced abortions.<sup>159</sup> Combined with existing higher law enforcement surveillance rates of these communities,<sup>160</sup> these factors mean that BIPOC people will face higher rates of criminalization, penalization, and privacy infringement,<sup>161</sup> contributing to the already disproportionately high level of incarceration of BIPOC persons in the US.<sup>162</sup>

### *Youth & Young People Under 18*

US abortion restrictions also disproportionately impact young people under 18. States have a responsibility to take “every possible economic and social measure” to “prevent [children] from being subjected to acts of violence and cruel and inhuman treatment.”<sup>163</sup> Moreover, under ICCPR Article 24, those under 18 have the right to special measures of protection, including measures to guarantee

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<sup>157</sup> See *Race and the War on Drugs*, NAT'L ASS'N OF CRIM. DEF. LAWYERS (Nov. 29, 2022), <https://www.nacdl.org/Content/Race-and-the-War-on-Drugs>.

<sup>158</sup> Siobhan Quenby et. al., *Miscarriage matters: the epidemiological, physical, psychological, and economic costs of early pregnancy loss*, 397 THE LANCET, 1658 (2021); DeArbea Walker, *With Roe overturned, Indigenous communities say it was always impossible for them to access abortion services*, INSIDER (June 24, 2022), <https://www.insider.com/roe-overturned-harder-for-indigenous-communities-to-access-abortion-2022-5>.

<sup>159</sup> “From a medical perspective, there is no physically significant difference between a medication abortion and a spontaneously occurring miscarriage. For example, the medicines used in medication abortion are used to help safely manage an incomplete miscarriage.” *Consumer Health Info: Medication Abortion and Miscarriage*, NAT'L WOMEN'S HEALTH CTR. (Aug. 15, 2019), <https://nwhn.org/abortion-pills-vs-miscarriage-demystifying-experience/>.

<sup>160</sup> Cynthia Conti-Cook, *Surveilling the Digital Abortion Diary*, 50 UNIV. BALT. L. REV. 1 (2020).

<sup>161</sup> See Madiba Dennie & Jackie Fielding, *supra* note 161; Priscilla Thompson & Alexandra Turcios Cruz, *How an Oklahoma woman's miscarriage put a spotlight on racial disparities in prosecutions*, NBC NEWS (Nov. 5, 2021), <https://www.nbcnews.com/news/us-news/woman-prosecuted-miscarriage-highlights-racial-disparity-similar-cases-rcna-4583>.

<sup>162</sup> See Leah Wang, *The U.S. criminal justice system disproportionately hurts Native people: the data, visualized*, PRISON POL'Y INITIATIVE (Oct. 8, 2021), <https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday/>. This pattern was already observed in criminal and civil detention patterns pre-*Dobbs*: out of 413 cases of arrest or forced intervention of pregnant persons documented between 1973 and 2005, 71% were economically disadvantaged women, 59% were women of color, and 52% were Black. See Lynn Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL., POL'Y, & L. 2 (2013) (noting that the socioeconomic status of economically disadvantaged was indicated by the fact that 71 percent qualified for indigent defense). The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has observed, “given that the [United States's] criminal legal system already disproportionately polices women and girls of African descent, [this] is the population group that suffers the most from increased surveillance and criminalization.” Rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Racism and the right to health*, U.N. Doc. A/77/197 (2022).

<sup>163</sup> HRC, General Comment No. 17: Article 24 (Rights of the Child), ¶ 3, U.N. Doc. CCPR/C/GC/17, (Apr. 7, 1989) [hereinafter “HRC General Comment 17”]. The Committee on the Rights of the Child (CRC) recently confirmed that a State party had violated a child's rights to health and life “by failing to provide her with information and access to legal and safe abortion.” Press Release, UN Office of the High Commissioner, “Peru violated child rape victim's rights by failing to guarantee access to abortion and criminally prosecuting her for self-abortion, UN Committee finds” (13 June 2023), <https://www.ohchr.org/en/press-releases/2023/06/peru-violated-child-rape-victims-rights-failing-guarantee-access-abortion>.

their effective access to health care and services and enjoy other economic, social, and cultural rights.<sup>164</sup> And although the category of age is not explicitly mentioned in the ICCPR’s prohibition on discrimination, the Covenant prohibits discrimination based on “other status,”<sup>165</sup> which has been interpreted to include age discrimination<sup>166</sup>

The impacts of being denied abortion care can be particularly acute for youth and children, whose lives are irrevocably disrupted by being forced to continue a pregnancy.<sup>167</sup> For example, a 12-year-old who became pregnant as a result of rape was unable to access abortion care in her home state of Mississippi, nor could she travel for care.<sup>168</sup> She is now attempting to parent an infant while attending eighth grade.

At least 36 states impose additional restrictions on youth seeking abortion care.<sup>169</sup> These restrictions compound existing discriminatory impacts. For instance, in Florida, where abortion is banned after 15 weeks<sup>170</sup> and abortion seekers must visit a clinic twice, at least 24 hours apart, to access care, youth under age 18 must also obtain permission from a parent or guardian, who must provide identification and a notarized consent document.<sup>171</sup> Such identification requirements disproportionately harm abortion seekers from immigrant families, especially undocumented immigrants, who may “forgo care altogether and remain pregnant to make sure there’s no risk of deportation, no risk of involving ICE [Immigration and Customs Enforcement] or police, just to ensure family safety.”<sup>172</sup>

The alternative for youth without a supportive parent or guardian to consent to an abortion is to petition a court for permission to access abortion in a confusing, difficult, and burdensome process

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<sup>164</sup> HRC General Comment 17, ¶1, 3.

<sup>165</sup> ICCPR Art. 26.

<sup>166</sup> This Committee made clear that young people under 18 are entitled to special measures of protection, because of their status as minors, in order to enjoy all the civil rights enumerated by the Covenant. In particular, States have a responsibility to take “every possible economic and social measure” to “prevent [children] from being subjected to acts of violence and cruel and inhuman treatment.” HRC General Comment 17, ¶1, 3. Similarly, the Committee on the Rights of the Child (CRC) confirmed that a State party had violated a child’s rights to health and life “by failing to provide her with information and access to legal and safe abortion.” Press Release, UN Office of the High Commissioner, *supra* note 163.

<sup>167</sup> Charlotte Alter, *supra* note 125; See also Caroline Kitchener, *An abortion ban made them teen parents. This is life two years later*, WASH. POST (Aug. 1, 2023),

<https://www.washingtonpost.com/politics/interactive/2023/texas-abortion-law-teen-parents/>

<sup>168</sup> The child gave birth in August; her one-word description of the birth: “Painful.” Charlotte Alter, *supra* note 125.

<sup>169</sup> Judicial Bypass Wiki, IF/WHEN/HOW (last visited Sept. 6, 2023), <https://judicialbypasswiki.ifwhenhow.org>

<sup>170</sup> *Abortion Policies in Florida*, GUTTMACHER INST. (accessed June 22, 2023),

<https://states.guttmacher.org/policies/florida/abortion-policies>.

<sup>171</sup> *Access Denied: How Florida Judges Obstruct Young People’s Ability to Obtain Abortion Care*, HUMAN RTS. WATCH (Feb. 2023) at 12, [https://www.hrw.org/sites/default/files/media\\_2023/02/us\\_florida0223\\_web.pdf](https://www.hrw.org/sites/default/files/media_2023/02/us_florida0223_web.pdf). Regarding third-party authorization, the World Health Organization (WHO) recommends “that abortion be available on the request of the woman, girl or other pregnant person without the authorization of any other individual, body or institution.” *Abortion care guideline - 3.3.2 Third-party authorization for abortion*, WORLD HEALTH ORG. (accessed Sept. 6, 2023), <https://srhr.org/abortioncare/chapter-3/pre-abortion-3-3/law-policy-recommendation-7-third-party-authorization-3-3-2/>.

<sup>172</sup> *Access Denied: How Florida Judges Obstruct Young People’s Ability to Obtain Abortion Care*, *supra* note 171.

called “judicial bypass.” Judges routinely deny young people’s petitions.<sup>173</sup> Research in several US states has shown that forced parental involvement laws disproportionately harm Black, Indigenous, and other youth of color.<sup>174</sup>

Idaho, where nearly all abortions are banned following *Dobbs*, recently created a new crime<sup>175</sup> of “abortion trafficking,”<sup>176</sup> making it “illegal for an adult to help a minor get an abortion across state lines without parental consent.”<sup>177</sup> Anyone found guilty of committing the crime will face two to five years in prison and could also be sued by the minor’s parent or guardian.<sup>178</sup>

In short, the disproportionate impact of abortion restrictions on marginalized populations, including people of color and youth,<sup>179</sup> violates their right to be free from discrimination under the ICCPR.

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<sup>173</sup> Young people whose petitions are denied are left with several options, each presenting serious challenges. Those who have access to a parent or legal guardian can suffer potentially life-altering consequences by complying with state law and getting consent from an adult who may be—at best—unsupportive, and—at worst—retaliatory or abusive. They can continue the pregnancy against their wishes or self-manage abortion outside the health system. They can find the resources, support, and time to travel to a state that does not require parental involvement or they can appeal the court’s decision and wait further for other judicial actors to review and decide on their case. See e.g. *Access Denied: How Florida Judges Obstruct Young People’s Ability to Obtain Abortion Care*, *supra* note 171; Amanda Jean Stevenson & Kate Coleman-Minahan, *Use of Judicial Bypass of Mandatory Parental Consent to Access Abortion and Judicial Bypass Denials, Florida and Texas, 2018-2021*, 113 AM. J. PUB. HEALTH 3 (2023).

<sup>174</sup> In October 2021, Illinois repealed its parental involvement law, a move to defend young people’s rights and dignity. A 2019 study in Massachusetts found that judicial bypass of the state’s parental consent law “disproportionately involves minors who identify as racial or ethnic minorities, and who are of low socioeconomic status.” “*The Only People It Really Affects Are the People It Hurts*”: *The Human Rights Consequences of Parental Notice of Abortion in Illinois*, HUMAN RTS. WATCH (Mar. 11, 2021), <https://www.hrw.org/report/2021/03/11/only-people-it-really-affects-are-people-it-hurts/human-rights-consequences>. See also, Elizabeth Janiak et al., *Massachusetts’ parental consent law and procedural timing among adolescents undergoing abortion*, 133 OBSTETRICS & GYNECOLOGY 5 (2019).

<sup>175</sup> H.R. 242, 67th Leg., 1st Reg. Sess. (Idaho 2023), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2023/legislation/H0242.pdf>.

<sup>176</sup> On July 11, 2023, a federal lawsuit was filed requesting a temporary injunction to block the law. Kelcie Moseley-Morris, *Advocacy groups file lawsuit against Idaho’s ‘abortion trafficking’ law*, IDAHO CAP. SUN (July 11, 2023), <https://www.boisestatepublicradio.org/news/2023-07-11/advocacy-groups-file-lawsuit-against-idahos-abortion-trafficking-law>.

<sup>177</sup> Morgan Winsor, *Idaho governor signs ‘abortion trafficking’ bill into law, 1st of its kind*, ABC NEWS (Apr. 6, 2023), <https://abcnews.go.com/US/idaho-governor-signs-abortion-trafficking-bill-law/story?id=98399580>.

<sup>178</sup> *Id.*

<sup>179</sup> It is important to note that abortion bans also have disparate impacts on other marginalized populations, and particularly on those marginalized along multiple grounds, such as race, sexual orientation, gender identity, disability status, and/or socioeconomic status. For more on the impacts of *Dobbs* across intersections, see Katherine Gallagher Robbins et. al., *supra* note 151; Shadow report from Women Enabled International.

### III. Violations of ICCPR Rights

#### Right to Life

Article 6 of the ICCPR recognizes every human being’s “inherent right to life.”<sup>180</sup> This Committee’s General Comment 36 noted that the right to life is a “supreme right” from which “no derogation is permitted,” further elaborating that the *effective* protection of the right to life is a “prerequisite for the enjoyment of all other human rights.”<sup>181</sup> The right to life must not be interpreted narrowly and includes within its ambit the right to “enjoy a life with dignity.”<sup>182</sup> While deaths due to denial of medical care linked to an abortion ban are obvious violations of the right to life,<sup>183</sup> the obligation of States to ensure this right also extends to all “reasonably foreseeable threats and life-threatening situations that can result in loss of life.”<sup>184</sup>

Specifically, this Committee has called upon States to remove existing barriers preventing access to safe abortions and refrain from implementing new barriers.<sup>185</sup> Other treaty bodies have reiterated this obligation and criticized barriers to accessing sexual and reproductive healthcare and requirements of preauthorization for abortion.<sup>186</sup> The HRC has specified that in regulating the voluntary termination of pregnancy, a State must not violate the pregnant person’s right to life, and that any restriction must not “subject [the pregnant person] to physical or mental pain or suffering that violates article 7 of the Covenant, discriminate against them or arbitrarily interfere with their privacy.”<sup>187</sup>

States are not only obligated to remove barriers to accessing abortion that cause harm, but also have a positive duty to ensure provision of “safe, legal and effective” abortion where the life or health of the pregnant person is at risk or “where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable.”<sup>188</sup> Over the years, this Committee has emphasized the importance of availability of abortion and abortion-related care in cases of fetal anomaly including in the cases of

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<sup>180</sup> ICCPR Art 6.

<sup>181</sup> HRC General Comment 36, ¶ 2.

<sup>182</sup> *Id.*, ¶ 3.

<sup>183</sup> Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings, ¶ 94, U.N. Doc. A/HRC/35/23 (2017)

<sup>184</sup> HRC General Comment 36, ¶ 7.

<sup>185</sup> HRC General Comment 36, ¶ 8.

<sup>186</sup> Comm. on Econ., Soc., & Cultural Rts., General Comment No. 22: The right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) ¶43 U.N. Doc. E/C/12/GC/22 (2016) [hereinafter “CESCR General Comment 22”]; Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 183, ¶ 103.

<sup>187</sup> HRC General Comment 36, ¶ 8.

<sup>188</sup> *Id.*

*Mellet and Whelan*.<sup>189</sup> As demonstrated above, the exceptions-based framework governing abortion in many US states fails to ensure safe access to abortion even in cases that meet the exceptions outlined in law.<sup>190</sup>

In all circumstances, this Committee has noted that a State cannot regulate abortions in a manner that contravenes its duty “to ensure that women and girls do not have to resort to unsafe abortions”<sup>191</sup> or that results in “life-threatening clandestine abortions.”<sup>192</sup> Liberalizing abortion laws, especially those that criminalize abortion, is one of the measures that States have been called upon to undertake as means to prevent unsafe abortions.<sup>193</sup> Restrictive abortion laws or those that penalize abortion have been identified as examples of impermissible restrictions that can perpetuate unsafe conditions.<sup>194</sup>

This Committee has further elaborated that States should not put in place criminal sanctions on women seeking abortions or on medical providers who assist them.<sup>195</sup> In order to remove impediments in accessing safe abortions the State must enable health-care providers to undertake their work without “undue interference, intimidation or restrictions.”<sup>196</sup> As discussed above, the current restrictions on abortion in the US result in widespread interference with and intimidation of providers and patients alike.<sup>197</sup>

## Right to be Free from Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment

ICCPR Article 7 states that no one shall be subjected to torture or to other CIDT; it allows for no derogation.<sup>198</sup> This Committee has clarified that the goal of Article 7 is to “protect both the dignity

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<sup>189</sup> *Whelan v. Ireland*; *Mellet v. Ireland*.

<sup>190</sup> See *supra*, *Chilling Effects and Deadly Consequences of Exceptions-Based Abortion Restrictions*, 19. For example, Deborah Dorbert was denied an abortion and forced to give birth under Florida law despite knowing that her baby would not survive for long after birth due to a fetal anomaly. A patient in Tennessee was denied an abortion despite severe complications, resulting in an emergency hysterectomy which ended her opportunity to become pregnant in the future. Nadine El-Bawab, *supra* note 89.

<sup>191</sup> HRC General Comment 36, ¶ 8.

<sup>192</sup> HRC General Comment 28, ¶10. See also CESCR General Comment 22, ¶¶10, 28, 40, 48, 57; Comm. on Elimination of Discrimination against Women, General Recommendation No. 34: The rights of rural women, ¶¶38, 39, U.N. Doc. CEDAW/C/GC/34 (2016).

<sup>193</sup> CESCR General Comment 22 ¶¶ 40, 48, 57.

<sup>194</sup> Special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Interim Report to the General Assembly, ¶ 26, U.N. Doc. A/66/254 (2011)

<sup>195</sup> HRC General Comment 36, ¶ 8.

<sup>196</sup> Special Rapporteur on extrajudicial, summary or arbitrary executions, Report to the General Assembly, ¶ 89, U.N. Doc. A/73/314 (2019).

<sup>197</sup> See *supra*, *Impacts of Abortion Bans on the Health and Lives of Pregnant Persons*, 15; Kavitha Surana, *Doctors Warned Her Pregnancy Could Kill Her. Then Tennessee Outlawed Abortion*, PROPUBLICA (Mar. 14, 2023), <https://www.propublica.org/article/tennessee-abortion-ban-doctors-ectopic-pregnancy>.

<sup>198</sup> Human Rts. Comm., General comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), ¶ 3, U.N. Doc. A/44/10 (Mar. 10, 1992) [hereinafter “HRC General Comment 20”].



and the physical and mental integrity of the individual” and the State party carries a duty to “afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7.”<sup>199</sup> State laws, particularly those that criminalize abortion and/or provide no exception in the event of rape, incest, threat to the life or health of the pregnant person, or fatal fetal anomaly,<sup>200</sup> violate the right to be free from torture and other CIDT.<sup>201</sup> This Committee makes clear that the domestic legal status of conduct is not determinative of its status under ICCPR Article 7 — in other words, even if conduct is permitted by domestic law, it may still be prohibited by Article 7.<sup>202</sup>

Existing HRC jurisprudence is also clear on the relationship between denial of abortion and torture and other CIDT: “[f]ailure to guarantee right to termination where lawful can violate the right to be free from torture, cruel, inhuman or degrading treatment.”<sup>203</sup> The unworkability of the exceptions-based regime, as outlined above, has led to a widespread failure to guarantee rights to termination even where technically permitted, in violation of Article 7. This Committee has also ruled that “[d]enial of abortion, health care and bereavement support in a situation of fatal diagnosis for the fetus caused suffering of sufficient intensity to violate the right to be free from torture, cruel, inhuman and degrading treatment.”<sup>204</sup> The role of medical providers and provision of information also factors into this analysis. For example, in the case of *Whelan v. Ireland*, this Committee noted that the “author’s suffering was further aggravated by the obstacles she faced in receiving information she needed about appropriate medical options from her known and trusted medical providers.”<sup>205</sup> This Committee has also emphasized how the right to be free from torture and other CIDT “relates not only to physical pain but also to mental suffering, and that the protection is particularly important in the case of minors.”<sup>206</sup>

Other human rights treaty body committees have expressed their views on restrictive abortion regulation and criminalization. For example, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) has found that “criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, [and] forced continuation of pregnancy... are forms of

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<sup>199</sup> HRC General Comment 20, ¶ 2.

<sup>200</sup> See e.g., *Whelan v. Ireland*, ¶¶ 7.5-7.7; *Mellet v. Ireland*, ¶¶ 7.4-7.6; *K.L. v. Peru*, ¶ 6.3; *L.M.R. v. Argentina*, ¶ 9.2); Comm. Against Torture, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, ¶¶ 46-47, U.N. Doc. CAT/C/GBR/CO/6 (June 7, 2019), ¶¶ 46-47; Comm. Against Torture, Concluding observations of the Committee against Torture - Paraguay, ¶ 22, U.N. Doc. CAT/C/PRY/CO/4-6, (Dec. 14, 2011); Comm. Against Torture, Concluding observations on the initial report of Timor-Leste, ¶ 34, U.N. Doc. CAT/C/TLS/CO/1 (Nov. 29, 2017).

<sup>201</sup> See CAT, Art. 16; ICCPR, Art. 7; CRC, Arts. 19, 37; CRPD, Art. 15.

<sup>202</sup> *Whelan v. Ireland*, ¶ 7.4.

<sup>203</sup> World Health Organization, *Abortion care guideline. Web Annex A. Key international human rights standards on abortion* 18, 38 (2022) (citing *L.M.R. v. Argentina*, ¶ 9.2).

<sup>204</sup> World Health Organization, *Abortion care guideline. Web Annex A. Key international human rights standards on abortion* 9, 16, 22, 38 (2022) (citing *Whelan v. Ireland* ¶ 7.7; *Mellet v. Ireland* ¶ 7.4-7.6).

<sup>205</sup> *Whelan v. Ireland*, ¶ 7.4.

<sup>206</sup> *K.L. v. Peru*, ¶ 6.3.

gender-based violence that... may amount to torture or cruel, inhuman or degrading treatment.”<sup>207</sup>

As detailed above, the exceptions-based framework of abortion access in the US foreseeably and inevitably results in denials of abortion even in the most urgent cases, causes arbitrary denials of care, and increases both mental and physical suffering of abortion seekers.

## Right to Privacy

US abortion restrictions infringe the right to privacy<sup>208</sup> by curtailing reproductive choices and interfering with a pregnant individual’s physical and psychological integrity.

HRC jurisprudence has established that an individual’s decision to seek an abortion falls under the right to privacy.<sup>209</sup> This Committee has also found that some abortion bans constitute impermissible interference with the ability to decide whether and how to proceed with a pregnancy, contrary to the right to privacy.<sup>210</sup> This Committee has additionally found that laws requiring judicial clearance to access abortion — such as “judicial bypass”<sup>211</sup> laws requiring court intervention for minors to access care without parental consent — constitute violations of privacy: “Requiring judicial authorization violates the right to privacy because it resolves by judicial intervention what should be resolved between patient and physician and the requirement to appear before the courts led to resort to illegal abortion.”<sup>212</sup> This Committee has further noted that “[r]equiring doctors and health-care providers to report cases where women have undertaken abortion fails to respect women’s privacy”<sup>213</sup> and urged “States should ensure the availability of and access to confidential post-abortion care in all circumstances.”<sup>214</sup>

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<sup>207</sup> Comm. on the Elimination of Discrimination against Women, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, ¶ 18, U.N. Doc. CEDAW/C/GC/35 (July 26, 2017); Violence against women includes “physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.” Women may suffer physical and psychological harm as a result of structurally inadequate conditions and/or discrimination in institutions and public systems; when governments tolerate such conditions, they are in effect condoning violence against women. CEDAW Art. 2.

<sup>208</sup> See ICCPR, Art. 17.

<sup>209</sup> The Human Rights Committee has found violations of the right to privacy in every case it has considered when the State interfered with reproductive decision-making or abortion access. *Whelan v. Ireland*, ¶ 7.8; *Mellet v. Ireland*, ¶¶ 7.7-7.8; *K.L. v. Peru*, ¶ 6.4; *L.M.R. v. Argentina*, ¶ 9.3; “States parties must provide information to enable the Committee to assess the effect of any laws and practices that may interfere with women’s right to enjoy privacy” such as “where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion. . . . States parties should report on any laws and public or private actions that interfere with the equal enjoyment by women of the rights under article 17, and on the measures taken to eliminate such interference and to afford women protection from any such interference.” HRC General Comment 28.

<sup>210</sup> See *Whelan v. Ireland*, ¶ 7.9; *Mellet v. Ireland*, ¶ 7.8; *K.L. v. Peru*, ¶ 6.4.

<sup>211</sup> See *Access Denied: How Florida Judges Obstruct Young People’s Ability to Obtain Abortion Care* at 12, *supra* note 171.

<sup>212</sup> *L.M.R. v. Argentina*.

<sup>213</sup> HRC General Comment 28.

<sup>214</sup> HRC General Comment 36.

The proliferation of abortion bans infringes on reproductive autonomy — the power to control all aspects of one’s reproductive health — of everyone who can become pregnant, whether they seek abortion care or not. Reproductive autonomy is “at the very core of [individuals’] fundamental right[s] to equality and privacy.”<sup>215</sup> The right to privacy of individuals, whether or not they are pregnant, and the rights of medical professionals are threatened by states’ use of digital surveillance to track the identities of people who seek or provide reproductive healthcare.

Notably, these practices are emerging and evolving in a landscape without protections, as “the U.S. lack[s] a comprehensive set of federal digital privacy laws.”<sup>216</sup>

## Right to Non-Discrimination

The ICCPR protects the right to be free from discrimination under a number of its articles, including Articles 2, 3, and 26. Specifically, the ICCPR states the responsibility of each State party “to respect and ensure to all individuals...the rights recognized in the present Covenant, without distinction of any kind.”<sup>217</sup> Further, it makes clear that States parties are “to ensure the equal right of men and women to the enjoyment of all civil and political rights.”<sup>218</sup> Finally, it states that “[a] persons are equal before the law and are entitled without any discrimination to the equal protection of the law” and “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground.”<sup>219</sup>

This Committee has further clarified that its understanding of the meaning of the term “discrimination” is “to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>220</sup> Additionally, this Committee has said that “when legislation is adopted by a State party, it must comply with the requirement...that its content should not be discriminatory.”<sup>221</sup> With specific reference to abortion, this Committee has noted that measures regulating abortion must not discriminate against women and girls.<sup>222</sup>

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<sup>215</sup> Working Grp. on discrimination against women and girls in law and practice, *supra* note 25.

<sup>216</sup> Nik Popli & Vera Bergengruen, *Lawmakers Scramble to Reform Digital Privacy After Roe Reversal*, TIME (July 1, 2022), <https://time.com/6193224/abortion-privacy-data-reform/>.

<sup>217</sup> ICCPR Art. 2(1).

<sup>218</sup> ICCPR Art. 3.

<sup>219</sup> ICCPR Art. 26.

<sup>220</sup> Human Rts. Comm., CCPR General comment No. 18: Non-discrimination, ¶ 7 (Nov. 10, 1989). (emphasis added).

<sup>221</sup> *Id.*, ¶ 12.

<sup>222</sup> HRC General Comment 36.

HRC jurisprudence has specifically clarified how the right to be free from discrimination intersects with abortion restrictions that impose involuntary parenthood: in its communications to the State party in *Mellet v. Ireland* and *Whelan v. Ireland*, this Committee outlined the gender-discriminatory nature of abortion criminalization, noting that Ireland’s criminal abortion law subjected women “to a gender-based stereotype of the reproductive role of women primarily as mothers” and that “stereotyping [a woman] as a reproductive instrument subjected her to discrimination.”<sup>223</sup> The CEDAW Committee has also explicitly recognized the gender-discriminatory nature of abortion restrictions: “It is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women.”<sup>224</sup>

The discriminatory purpose of US abortion restrictions can be seen in a number of ways. As the CEDAW Committee points out, the criminalization of healthcare needed only by people capable of pregnancy — primarily women — is itself discriminatory.<sup>225</sup> Additionally, US abortion laws are grounded in harmful gender stereotypes about the appropriate roles women should play in society, such as viewing women as vessels, incubators,<sup>226</sup> and “designed for” birth.<sup>227</sup> Restrictions aimed at provoking shame or guilt in the patient — such as requiring delivery of medically dubious or

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<sup>223</sup> See *Mellet v. Ireland*, ¶¶3.19, 7.11; *Whelan v. Ireland*, ¶7.12.

<sup>224</sup> “It is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women.” Comm. on the Elimination of Discrimination against Women, General Recommendation No. 24: Article 12 of the Convention (Women and Health), ¶ 11, U.N. Doc. A/54/38/Rev.1 (1999). Elaborating on the restrictive legal landscape for abortion in Northern Ireland in 2018, the CEDAW Committee further found “that the failure to combat stereotypes depicting women primarily as mothers exacerbates discrimination against women and violates article 5, read with articles 1 and 2, of the Convention.” Comm. on the Elimination of Discrimination against Women, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, ¶ 74, U.N. Doc. CEDAW/C/OP.8/GBR/1 (Mar. 6, 2018). Similarly, the UN Working Group on discrimination against women and girls (WGDAW) has emphasized that “the right to safe termination of pregnancy is an equality right for women.” Working Grp. on discrimination against women and girls in law and practice, *supra* note 25.

<sup>225</sup> See *Mellet v. Ireland*, Annex I: Individual opinion of Committee member Yadh Ben Achour (concurring), ¶ 3. Note that some proposed abortion restrictions include explicit rejections of any gender identity other than “woman” or “female” for any person capable of pregnancy, implying that the category of “woman” and “capable of pregnancy” are coextensive. This reinforces stereotypes of women as defined by the capacity for motherhood. See, e.g., S.B. 240, 125th Gen. Assemb., (S.C. 2023) (defining “Female” as “a biological female assigned at the time of birth or an intersexed person capable of producing an ovum at birth.”). A clarification of Texas’s abortion restrictions has been proposed that would read, in part, “in relation to pregnant biological females who do not identify as a woman or female... A statute that regulates or prohibits abortion may not be construed to permit the performance or inducement of an abortion on a pregnant biological female who does not identify as a woman or female.” H.B. 3850, 88th Leg., (Tex. H., 2023).

<sup>226</sup> Selena Simmons-Duffin, *supra* note 136.

<sup>227</sup> Discussing the case of the ten-year-old rape victim mentioned above, who was forced to leave Ohio to access abortion care: “While a pregnancy might have been difficult on a ten-year-old-body, a woman’s body is designed to carry life.” *Require 60% vote to Approve Any Constitutional Amendment: Hearing on H. Joint Resol. 1 Before Ohio H. Const. Resol. Comm.*, 135th Gen. Assemb. (Apr. 18, 2023) (statement of Laura Strietmann, Executive Director, Cincinnati Right to Life, at 2:35:30) <https://www.ohiochannel.org/video/ohio-house-constitutional-resolutions-committee-4-18-2023>

inaccurate information on pain sensitivity of the fetus<sup>228</sup> and ultrasound requirements<sup>229</sup> — contribute to such discriminatory purpose.

The discriminatory effects of abortion restrictions are apparent in the risks to pregnant people’s lives posed by the restrictions outlined above, including an increase in unsafe abortions, the forced continuation of high-risk pregnancies, increased risk of domestic violence, and reduced access to healthcare, all of which only impact those who can become pregnant, primarily women. Denial of abortion also enforces conditions of socioeconomic marginalization on those who can become pregnant.<sup>230</sup>

The Committee on the Elimination of Racial Discrimination (CERD) has also indicated that restrictions on abortion that disproportionately impact people of color run afoul of international obligations to eliminate racial discrimination.<sup>231</sup> In its 2022 review of the US, the CERD expressed,

deep[] concern[] at the Supreme Court’s ruling in *Dobbs* ... which overturned nearly 50 years of protection of women’s access to safe and legal abortion in the State party; at the consequent profound disparate impact on the sexual and reproductive health and rights of racial and ethnic minorities, in particular, those with low incomes; and at the disparate impact of legislation and other measures at the state level restricting access to safe and legal abortion or criminalizing abortion.<sup>232</sup>

The CERD recommended that the US “take all measures necessary...to provide safe, legal and effective access to abortion in accordance with the State party’s international human rights obligations.”<sup>233</sup>

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<sup>228</sup> “Another assertion that is often used by abortion opponents to discourage women from having abortions is that a fetus has the ability to feel pain; however, researchers have not been able to conclusively determine at what point in development, if at all, a fetus perceives pain.” Chínú Turner Richardson, Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, GUTTMACHER INST. (Oct. 23, 2006), <https://www.guttmacher.org/gpr/2006/10/misinformed-consent-medical-accuracy-state-developed-abortion-counseling-materials>.

<sup>229</sup> “Since the mid-1990s, several states have moved to make ultrasound part of abortion service provision. Some laws and policies require that a person seeking an abortion receive information on accessing ultrasound services, while others require that a patient undergo an ultrasound before an abortion. Since routine ultrasound is not considered medically necessary as a component of first-trimester abortion, the requirements appear to be a veiled attempt to personify the fetus and dissuade an individual from obtaining an abortion. Moreover, an ultrasound can add significantly to the cost of the procedure.” *Requirements for Ultrasound*, GUTTMACHER INST. (accessed Sept. 1, 2023), <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound>.

<sup>230</sup> Diana Greene Foster et. al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH 3 (2018).

<sup>231</sup> See ICERD, Arts. 2, 5. See also Comm. on the Elimination of Racial Discrimination, Concluding observations on the combined tenth to twelfth reports of the United States of America, ¶¶ 35-36, U.N. Doc. CERD/C/USA/CO/10-12 (Sept. 21, 2022).

<sup>232</sup> Comm. on the Elimination of Racial Discrimination, Concluding observations on the combined tenth to twelfth reports of the United States of America, ¶ 35, U.N. Doc. CERD/C/USA/CO/10-12 (Sept. 21, 2022).

<sup>233</sup> *Id.*, ¶ 36.

As predicted, the *Dobbs* decision has had discriminatory effects on communities marginalized by racial discrimination. Forced travel for abortion is more difficult for people of color, who also seek abortions at higher rates than white people due to systemic barriers to other forms of reproductive healthcare. Pregnancy and childbearing are more dangerous for people of color, and forced parenting enforces lower socioeconomic status upon them.<sup>234</sup>

Finally, international human rights law has made clear that sexual and reproductive health services, including safe abortion, must not be discriminatorily denied to youth and young people under 18. The Special Rapporteur on health has stated that “States should ensure health systems and services can meet the specific sexual and reproductive health needs of adolescents, including safe abortion.”<sup>235</sup>

The Committee on the Rights of the Child (CRC) has also commented on the need for States to “ensure health systems and services can meet the specific sexual and reproductive health needs of adolescents, including safe abortion”<sup>236</sup> and to take steps to “reduce maternal mortality and morbidity in adolescent girls including addressing unsafe abortion.”<sup>237</sup> In June 2023, the CRC found that a young woman in Peru, who was denied access to reproductive care,<sup>238</sup> “was subject to discrimination based on her age, gender, ethnic origin and social status.”<sup>239</sup> The CRC called for Peru to “decriminalize abortion in all cases of child pregnancy, ensure access to safe abortion services and post-abortion care for pregnant girls, particularly in cases of risk to the life and health of the mother, rape or incest, and to amend the regulations governing access to therapeutic abortion to provide for its specific application to girls.”<sup>240</sup>

Despite these recommendations, regulations in the US continue to produce discriminatory effects on youth, who are singled out for additional requirements in order to access medical care based on their age. These policies result in denials of care, medical complications, and negatively impact young people’s ability to access their other civil and political rights.<sup>241</sup>

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<sup>234</sup> See Global Justice Center et. al., *Submission to the United Nations Committee on the Elimination of Racial Discrimination*, *supra* note 17.

<sup>235</sup> Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Report to the General Assembly, U.N. Doc. A/HRC/32/32 (2016).

<sup>236</sup> Comm. on the Rts. of the Child, General Comment No. 15: The right of the child to the enjoyment of the highest attainable standard of health (Article 24), U.N. Doc. CRC/C/GC/15 (2013).

<sup>237</sup> Comm. on the Rts. of the Child, General Comment No. 4: Adolescent health and development, U.N. Doc. CRC/GC/2003/4 (2003).

<sup>238</sup> The Committee found that Camila was subjected to rape, incest, denial of abortion and information, and harassment by a prosecutor over her spontaneous abortion. Press Release, UN Office of the High Commissioner, *supra* note 163.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Judicial Bypass Wiki, IF/WHEN/HOW (last visited Sept. 6, 2023), <https://judicialbypasswiki.ifwhenhow.org>; IDAHO CODE § 18-623 (2023) <https://legislature.idaho.gov/statutesrules/idstat/Title18/T18CH6/SECT18-623/>.

## IV. Conclusion and Recommendations

In May, UN human rights experts issued a communication to the US “expressing serious concerns” about “the grave and alarming deterioration in [access] to comprehensive sexual and reproductive healthcare, including abortion, following [*Dobbs*], and the direct and indirect violations of international human rights law as a result of the decision.”<sup>242</sup>

The CERD also made specific recommendations for the US to protect access to abortion in its concluding observations last year, urging the US to:

take all measures necessary, at the federal and state levels, to address the profound disparate impact of [*Dobbs*] on women of racial and ethnic minorities, Indigenous women and those with low incomes, and to provide safe, legal and effective access to abortion in accordance with the State party’s international human rights obligations. It further recommends that the State party take all measures necessary to mitigate the risks faced by women seeking an abortion and by health providers assisting them, and to ensure that they are not subjected to criminal penalties.<sup>243</sup>

Despite these urgent calls, abortion access — and the associated rights to life, privacy, freedom from torture, and non-discrimination — continues to be threatened in the US.

In its last review of the United States, this Committee made little mention of SRHR. Given the significant shifts that have taken place in the US since that time, and especially in the last year since the Supreme Court overturned the constitutional right to abortion, we urge the Committee to consider the following recommendations to the State party:

- Take federal and state legislative steps to guarantee effective access to affordable, legal, and quality abortion care in compliance with human rights standards.
- Protect women, girls, and people who can become pregnant from criminalization related to pregnancy and pregnancy outcomes, including miscarriages, stillbirths, and abortions (whether

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<sup>242</sup> Special Rapporteur on violence against women and girls, its causes and consequences; the Special Rapporteur on the rights of persons with disabilities; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on minority issues; the Special Rapporteur on extreme poverty and human rights; the Special Rapporteur on the right to privacy; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on freedom of religion or belief; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Working Group on discrimination against women and girls (Comm. AL USA 11/2023) (May 10, 2023), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=28053>.

<sup>243</sup> Comm. on the Elimination of Racial Discrimination, Concluding observations on the combined tenth to twelfth reports of the United States of America, ¶ 36, U.N. Doc. CERD/C/USA/CO/10-12 (Sept. 21, 2022).

clinic-based, through telehealth, or self-managed).

- Ensure equitable federal access to medication abortion to all people, regardless of the presence of restrictive laws in a patient's state of domicile.
- Repeal laws that require young people seeking abortions to notify or obtain consent from parents or guardians to receive abortion care, or that require them to undergo judicial bypass procedures.
- Address racial and ethnic origin discrimination in healthcare and health outcomes directly, through measures that: (1) remedy structural racism and intersectional discrimination; (2) make resources available to communities of color affected by reproductive health inequities; and (3) prioritize the meaningful participation and leadership of BIPOC people in all systems and at all points of decision-making processes that impact their SRHR.
- Enact adequate legislation and policies to guarantee equal access to life saving obstetric care to Black women according to their specific needs considering their socioeconomic conditions, to promote equal access to quality, adequate, and timely health services, and to address discriminatory health practices. These laws should contemplate temporary special measures to reach women, girls, and people who can become pregnant at higher risk of dying from preventable causes including unsafe abortion and pregnancy complications.
- Protect the confidentiality of persons who can become pregnant and medical professionals by: (1) limiting the collection of patient data; (2) prohibiting the disclosure of confidential information to any third parties, including law enforcement, without consent; and (3) informing patients of their right to privacy and the confidentiality of their visit and queries.
- Protect medical professionals who provide abortion and other reproductive healthcare by prohibiting their prosecution, disbarment, loss of license, or other retribution or reprimanding measures.