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BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY

**“THE TEXAS ABORTION BAN AND ITS DEVASTATING IMPACT ON
COMMUNITIES AND FAMILIES”
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Chairman Nadler, Ranking Member Jordan, and Members of the House Committee on the Judiciary, thank you for the opportunity to testify before you today. My name is Khiara M. Bridges, and I am a Professor of Law at the University of California, Berkeley, School of Law, where I teach Criminal Law, Family Law, and Reproductive Rights and Justice. I also serve as the Faculty Director of the Berkeley Center on Reproductive Rights and Justice. I am here today to explain how abortion restrictions and bans, like Texas Senate Bill 8, disproportionately impact pregnant people of color—especially black women.

For decades, the Supreme Court has reaffirmed the central holding of *Roe v. Wade*: a person has a right “to choose to have an abortion before viability and to obtain it without undue interference from the State.”¹ The Court in *Planned Parenthood v. Casey* made clear that a “woman’s right to terminate her pregnancy before viability is the most central principle of *Roe*. It is a rule of law and a component of liberty we cannot renounce.”² Texas Senate Bill 8 (SB8), which bans abortion after six weeks of pregnancy, violates this central principle of *Roe*. The law constitutes a near-total ban on abortion—banning abortion far before viability and before many people even know they are pregnant. Consequently, SB8 is unconstitutional.

Nevertheless, SB8 is in effect as of the filing of this testimony, and it has been harming Texans in need of abortion care for over two months. This is solely because the law leaves enforcement of its prohibition on abortion to private citizens instead of state actors—a feature of the law that its architects hoped would permit the law to evade judicial review. The United States Supreme Court cited these “complex and novel antecedent procedural questions” as a reason for not enjoining the law.³ It is

¹ *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992).

² *Id.* at 871.

³ *Whole Woman’s Health v. Jackson*, No. 21A24, 2021 WL 3910722 (U.S. Sept. 1, 2021) (mem.).

important to reiterate that SB8 contains these “procedural questions” solely because its authors wanted to give receptive federal courts the opportunity to leave the law in place. In essence, “the State’s gambit has worked.”⁴ Abortion providers in Texas have been unable to provide care to scores of patients who desperately need it.⁵

The federal courts have allowed Texas to infringe the constitutional rights of the people within its borders. In practice, some people seeking to control their reproductive lives have been able to surmount the hurdles of this unconstitutional abortion ban by traveling out of state.⁶ But the greatest harms have fallen, and will continue to fall, on the most marginalized people in Texas. For them, SB8’s burdens—including increased costs associated with the procedure itself, travel expenses, the cost of childcare services when they are away from home, wages they will have to forfeit when taking time off of work, and the cost of accommodations if the location to which they have to travel for abortion care is so far away from home that they have to stay overnight—are insurmountable.

The lengths to which Texans are going to access abortion are not new. While the constitutional right to abortion remains intact in theory, medically unnecessary abortion regulations have been closing clinics and imposing burdens on patients for decades. Many states have managed to erode access to abortion to the point of near extinction. And just as in Texas, the burdens fall most heavily on those without the means to overcome them—poor people.

Crucially, because there is a close relationship between socioeconomic status and race—with black people disproportionately living in poverty—burdens to *poor* people constitute burdens to *black* people.⁷ The result is that disproportionate numbers of black people will be among those who are coerced to continue pregnancies and have children against their will, to seek unsafe methods of abortion, or to risk exposure to criminal prosecution for attempting to self-manage abortion. The reproductive justice framework asserts that all people deserve the right to control their bodies, including the right to determine if and when they will have a child. While the decision whether to carry a pregnancy to term is impacted by access to economic, social, and political power, individuals must be able to make the decision for

⁴ *United States v. Texas*, slip op. at 6, No. 21A85 (U.S. Oct. 22, 2021) (Sotomayor, J., dissenting).

⁵ See Kari White et al., *Initial Impacts of Texas’ Senate Bill 8 on Abortions in Texas and at Out-of-State Facilities*, TEX. POLICY EVALUATION PROJECT 1, 1 (Oct. 2021), <http://sites.utexas.edu/txpep/files/2021/11/TxPEP-brief-SB8-inital-impact.pdf> (finding that the number of abortions in Texas fell by half following the implementation of SB8); see also Claire Cain Miller, Quoc Trung Bui, & Margot Sanger-Katz, *Abortions Fell by Half in Month After New Texas Law*, THE N.Y. TIMES (Oct. 29, 2021), <https://www.nytimes.com/interactive/2021/10/29/upshot/texas-abortion-data.html>.

⁶ See Barbara Hoberock, *Oklahoma City abortion clinic sees caseload double after Texas law takes effect*, TULSA WORLD (Sept. 26, 2021), https://tulsaworld.com/news/state-and-regional/oklahoma-city-abortion-clinic-sees-caseload-double-after-texas-law-takes-effect/article_f967e386-1d4c-11ec-a0d7-3b7232634b6b.html; see also Brief for Planned Parenthood of Greater Texas Surgical Health Services et al. as Amici Curiae Supporting Petitioners, *United States v. Texas*, No. 21-588 (U.S. Oct. 2021).

⁷ See Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2093 (2021) (“[B]ecause race and socioeconomic status are often related—particularly in those regions of the country where abortion restrictions are more extensive—the burden on poor women will also result in a burden on women of color, rendering abortion inaccessible to these groups.”).

themselves. Denying black people the ability to determine the reproductive trajectory of their lives, which abortion bans like SB8 and other abortion restrictions accomplish, is a form of racial injustice that continues a long history of reproductive oppression of people of color.

I. CONSTITUTIONAL PROTECTIONS FOR ABORTION RIGHTS AND THE DEVASTATING IMPACT OF ABORTION BANS AND RESTRICTIONS

The landmark decision *Roe v. Wade* guarantees each individual the right to make personal decisions about family, relationships, and bodily autonomy.⁸ Since that decision, the Supreme Court has repeatedly reaffirmed *Roe*'s central holding, including in *Planned Parenthood v. Casey*, where the Supreme Court explained that “the ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives.”⁹ Over the decades since the Court first held that the Constitution encompasses protection for the right to abortion, most recently in *June Medical Services v. Russo*, it has also recognized that the right is meaningless if restrictions are allowed to dismantle actual access to abortion services.¹⁰

But despite the clear recognition of a constitutional right to abortion, anti-abortion lawmakers and advocates have engaged in a decades-long strategy to undermine this right, with the stated goal of overturning *Roe v. Wade*.¹¹ In the forty-seven years since *Roe* was decided, states have enacted 1,336 abortion restrictions¹² and are showing no sign of slowing down. Nearly half of those restrictions were enacted in the last ten years. Further, state legislatures that are hostile to abortion rights have grown increasingly brazen. In the last two years alone, Georgia, Idaho, Iowa, Kentucky, Louisiana, Mississippi, Oklahoma, South Carolina, and Texas have enacted 6-week bans—i.e., laws that ban abortion about two weeks after a missed regular period and before many people even know they are pregnant; Missouri enacted an 8-week ban; and Alabama banned abortion from the moment of conception.¹³ Texas SB8, a law that uses a private enforcement mechanism to enforce

⁸ *Roe v. Wade*, 410 U.S. 113, 155, 153 (1973).

⁹ *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 835 (1992).

¹⁰ *June Medical Services v. Russo*, 591 U.S. __ (2020).

¹¹ See, e.g., AMS. UNITED FOR LIFE, DEFENDING LIFE 2021 (2021), <https://aul.org/wp-content/uploads/2021/02/Defending-Life-2021.pdf>.

¹² See *U.S. states have enacted 1,336 abortion restrictions since Roe v. Wade was decided in 1973*, GUTTMACHER INST. (Oct. 1, 2021), <https://www.guttmacher.org/infographic/2021/us-states-have-enacted-1336-abortion-restrictions-roe-v-wade-was-decided-1973>.

¹³ *Robinson v. Marshall*, 415 F. Supp. 3d 1053 (M.D. Ala. 2019) (striking down near-total abortion ban); *Women of Color Reprod. Justice Collective v. Kemp*, 472 F. Supp. 3d 1297 (N.D. Ga. 2020), *appeal filed*, No. 20-13024 (11th Cir. Aug. 11, 2020); *Planned Parenthood of the Heartland v. Reynolds*, No. EQCE83074, 2019 WL 312072 (Iowa Dist. Ct. Polk Cty. Jan. 22, 2019); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178-DJH, 2019 WL 1233575 (W.D. Ky. Mar. 15, 2019) (temporary restraining order); *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. et al. v. Parson*, No. 2:19-cv-4155-HFS (W.D. Mo. Aug. 27, 2019); *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 804 (S.D. Ohio 2019) (preliminary injunction); *Memphis Ctr. For Reprod. Health v. Slatery*, No. 3:20-CV-00501, 14 2020 WL 4274198 (M.D. Tenn. July 24, 2020) (granting preliminary injunction), *appeal filed*, No. 20-5969 (6th Cir. Aug. 24, 2020); *Jackson Women's*

a ban on abortion at six weeks of pregnancy, is without doubt the most draconian abortion law that has been allowed to stand since the *Roe* decision was handed down. Other states are already gearing up to pass copycat laws.¹⁴

Restrictions and bans like SB8 have undoubtedly been a success for those who seek to use legislation to impede access to the constitutional right to abortion. These laws, whether they are targeted regulations of abortion providers (TRAP laws), gestational bans, or medically unnecessary restrictions disguised as “good medicine,” have had the dual devastating effect of closing down abortion clinics *and* preventing patients from accessing care at the clinics that remain. In order to comply with the multiple hurdles placed in their path, patients are forced to travel increasingly long distances, forfeit wages, and risk their jobs in order to access their constitutionally protected right to abortion.

A. Texas Senate Bill 8

Texas Senate Bill 8 (SB8) bans abortion care after approximately six weeks of pregnancy—before many people know they are pregnant—and incentivizes private individuals to seek monetary gain by suing anyone who provides an abortion or assists a pregnant person in obtaining one after the law’s limit. SB8 has the purpose—and has had the documented effect—of eliminating most abortions in Texas while making it exceedingly difficult to challenge the law in court.¹⁵

Pre-viability abortion bans have been universally blocked by federal courts when challenged, but SB8 was specifically designed to be difficult to block before it took effect. By shifting enforcement from state officials to private individuals, Texas attempted to evade legal accountability and prevent the federal courts from enjoining this unconstitutional ban before it took effect—in essence, “box[ing] out the judiciary.”¹⁶

To quote Justice Sotomayor: SB8 is “a breathtaking act of defiance – of the Constitution, of [the Supreme] Court’s precedents, and of the rights of women seeking abortion throughout Texas.”¹⁷

Health Org. v. Dobbs, 951 F.3d 246 (5th Cir. 2020) (affirming preliminary injunction of Texas’s 6-week ban); H.B. 366, 66th Leg. Reg. Sess. (Idaho 2021) <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/legislation/H0366.pdf>; S.B. 184, 2019 Reg. Sess. (La. 2019) <http://www.legis.la.gov/legis/ViewDocument.aspx?d=1140119> (enacted “heartbeat” ban that would have become effective had the Fifth Circuit upheld Mississippi’s ban); H.B. 2441, 58th Leg. Reg. Sess. (Okla. 2021) http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20ENR/hB/HB2441%20ENR.PDF; S.B. 1, 124th Gen. Assemb. (S.C. 2021) https://www.scstatehouse.gov/sess124_2021-2022/bills/1.htm.

¹⁴ Caroline Kitchener, *Lawmakers are racing to mimic the Texas abortion law in their own states. They say the bills will fly through.*, THE LILY (Oct. 19, 2021), <https://www.thelily.com/lawmakers-are-racing-to-mimic-the-texas-abortion-law-in-their-own-states-they-say-the-bills-will-fly-through/>.

¹⁵ Claire Cain Miller, Quoc Trung Bui, & Margot Sanger-Katz, *Abortions Fell by Half in Month After New Texas Law*, THE N.Y. TIMES (Oct. 29, 2021), <https://www.nytimes.com/interactive/2021/10/29/upshot/texas-abortion-data.html>.

¹⁶ Reply Brief of Intervenors at 3-4, *United States v. Texas*, No. 21-50949 (5th Cir. Oct. 14, 2021).

¹⁷ *Whole Woman’s Health v. Jackson*, slip op. at 3, No. 21A24 (U.S. Sept. 1, 2021) (Sotomayor, J., dissenting).

“Breathtaking” describes not only Texas’s defiance and the Kafkaesque features of SB8 designed to shield it from the judiciary, but also the impact on people in Texas. Pregnant people are “devastated” and “panicked.”¹⁸ Some people with resources have fled to other states, an exodus that has had “stunning” and “crushing” impacts on the clinics in those states; moreover, this exodus has frustrated the ability of the residents of those neighboring states to make appointments to obtain abortion services.¹⁹ Many other Texans are unable to attain abortion care out of state because of finances, dangerous situations, immigration status, or other obstacles.²⁰ While SB8 and other abortion regulations would appear to apply equally across the board, the people who find themselves without recourse in the shadow of abortion restrictions are people of color, native people, people with disabilities, young people, LGBTQ+ people, and others whose access to abortion is additionally frustrated by structural inequities in access to health care.

On November 1, 2021, the Supreme Court heard oral arguments in two cases challenging Texas SB8: a lawsuit filed by a coalition of abortion providers and advocates represented by the Center for Reproductive Rights, Planned Parenthood Federation of America, the Lawyering Project, the ACLU, and the ACLU of Texas, and a second lawsuit filed by the U.S. Department of Justice (DOJ). The cases respectively address the threshold issue of whether federal courts have the power to preemptively block blatantly unconstitutional laws like S.B. 8 and whether the DOJ can seek injunctive relief against Texas judges, clerks, and other state officials. The Court deferred ruling on the DOJ’s request to block the law until after oral argument on November 1.

Dissenting from the Court’s decision not to block SB8 immediately, Justice Sotomayor vividly wrote²¹:

I cannot capture the totality of this harm in these pages [Texas] has so thoroughly chilled the exercise of the right recognized in *Roe* as to nearly suspend it within its borders and strain access to it in other States. The State’s gambit has worked. The impact is catastrophic. These ruinous effects were foreseeable and intentional.

If the Supreme Court holds that neither the coalition of abortion providers nor the Department of Justice can challenge SB8, and that federal courts are powerless to block laws like SB8, there most certainly will be a proliferation of legislation passed in other states that prohibit the exercise of disfavored federal constitutional rights,

¹⁸ *United States v. Texas*, No. 1:21-CV-796-RP, 2021 WL 4593319 at *40 (W.D. Tex. Oct. 22, 2021).

¹⁹ *Id.* at *43-45.

²⁰ *Id.* at *42.

²¹ *United States v. Texas*, slip op. at 6, No. 21A85 (U.S. Oct. 22, 2021) (Sotomayor, J., dissenting).

including outright bans on access to abortion, limitations on free speech, and restrictions on the right to marry.

II. BLACK PEOPLE ARE SYSTEMATICALLY DENIED THEIR CONSTITUTIONAL RIGHT TO ACCESS ABORTION

A. Black people make up a disproportionate number of those who obtain abortions in the U.S.

In 2018, the rate of abortion was 21.2 per thousand black women and 6.3 per thousand white women, making black women more than three times as likely to receive abortion services than their white counterparts.²² Consequently, any law that makes it more difficult for people to access abortion makes it more difficult for black people to access abortion.

B. Intersecting and systemic conditions of inequality, which disproportionately affect black people, compound the effects of abortion restrictions and bans

Women, people of color, low-income people, trans and nonbinary people, LGBTQ+ people, immigrants, native people, and people with disabilities all face unique challenges when seeking affirming, affordable, and high-quality healthcare. These various challenges place abortion and other reproductive care services out of reach for many. These inequities compound the harms of abortion barriers and restrictions, creating circumstances under which many people of color are systematically precluded from accessing their constitutional right to abortion.²³

1. Black people disproportionately bear the burdens of poverty in the United States

While the poverty rate among white people in 2019 was 7.3 percent, the rate among black people was 18.8 percent.²⁴ Thus, black people are more than twice as likely as their white counterparts to be impoverished. The costs of accessing abortion care are greatly exacerbated by abortion bans and other restrictions, the navigation of which necessitates resources to cover childcare costs, missed wages, transportation costs, and risks to employment that come with taking time off of work for those who do not have access to paid or unpaid leave. For the impoverished, these costs are often

²² *Abortion Surveillance – United States, 2018*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 27, 2020), https://www.cdc.gov/mmwr/volumes/69/ss/ss6907a1.htm#T5_down.

²³ See, e.g., Murray at 2090–91 (“As reproductive justice advocates make clear, for many people of color, the decision to terminate a pregnancy is shot through with concerns about economic and financial insecurity, limited employment options, diminution of educational opportunities and lack of access to health care and affordable quality childcare.”).

²⁴ John Creamer, *Inequalities Persist Despite Decline in Poverty For All Major Race and Hispanic Origin Groups*, U.S. CENSUS BUREAU (Sept. 15, 2020), <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html>.

impossible to overcome, putting abortion care out of reach for low-income people who live in states with onerous abortion restrictions.

2. Black people are more likely than other racial groups to encounter difficulties accessing safe and effective contraception

Most people who have abortions generally do so to terminate an unintended pregnancy.²⁵ Notably, researchers have documented that black people experience unintended pregnancies at higher rates than white people.²⁶ Black people's higher rate of unintended pregnancy is due, in significant part, to barriers to their obtaining safe, effective contraception.²⁷ These barriers include the scarcity of geographically accessible reproductive healthcare, the financial inaccessibility of more reliable but "usually more expensive" prescription contraceptives, and a basic unavailability of general medical care.²⁸ Further, without health insurance, accessing effective contraception is much more difficult, thereby increasing the likelihood of an unintended pregnancy and the consequent need for abortion care.

3. Black women experience higher rates of intimate partner violence

Because black people have higher rates of poverty, black people who identify as women experience intimate partner violence at higher rates than women of other races.²⁹ Specifically, more than 40% of black women experience physical violence by an intimate partner, compared with 31.5% of all women.³⁰ Further, black women are more likely than women of other races to be victims of rape during their lifetimes.³¹ Black women also experience reproductive coercion—where "partners actively try to impregnate their partner against their wishes, interfere with contraceptive use," pressure their partner not to use contraception, or interfere with condom use—at higher rates than white women.³² The higher rate of intimate partner violence, sexual assault, and reproductive coercion among black women—coupled with their lack of access to safe and effective contraception—contributes to higher rates of unintended pregnancies, and therefore higher rates of abortion, among black people.

²⁵ Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 110 (2005).

²⁶ Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL'Y REV. 2, 3 (2008).

²⁷ *Id.* at 2–4.

²⁸ *Id.* at 4–5.

²⁹ ASHA DUMONTHIER ET AL., INST. FOR WOMEN'S POL'Y RSCH., THE STATUS OF BLACK WOMEN IN THE UNITED STATES xix (2017).

³⁰ DUMONTHIER ET AL. at 119.

³¹ *Id.* at 120–21.

³² Charvonne N. Holliday et al., *Racial Differences in Pregnancy Intention, Reproductive Coercion, and Partner Violence Among Family Planning Clients: A Qualitative Exploration*, 28 WOMEN'S HEALTH ISSUES 205, 206 (2018).

4. Black people experience significantly higher rates of maternal mortality and morbidity than white people

Maternal mortality is a tragedy in this country. The 2018 maternal mortality ratio (“MMR”) in the U.S.—17.4 deaths per 100,000 live births—is more than double that of most other high-income countries and as much as *nine* times higher than some (such as New Zealand and Norway).³³ And this number was even higher (20.1) in 2019.³⁴

The national MMR obscures the fact that not all people in the U.S. are similarly situated when it comes to the likelihood that they will not survive pregnancy, childbirth, or the postpartum period. To be precise, the path to motherhood is significantly deadlier for nonwhite people, specifically black people, than it is for white people.

Black people are more than three times as likely to die from pregnancy-related causes than their white counterparts.³⁵ This racial disparity in maternal mortality has persisted across generations.³⁶ Indeed, the gap has widened.³⁷ Eighty years ago, black people were twice as likely as white people to die on the path to parenthood.³⁸ Thirty years ago, black people were three times as likely as white people to die.³⁹ Decades later, those odds are unchanged.⁴⁰

Maternal morbidity is also a tragedy in this nation. “Severe maternal morbidity” refers to cases in which a pregnant or recently postpartum person faces a life-threatening diagnosis or must undergo a life-saving medical procedure—like a hysterectomy, blood transfusion, or mechanical ventilation—to avoid death.⁴¹ For every maternal death in the country, there are close to 100 cases of severe maternal morbidity.⁴² As with maternal mortality, there are racial disparities in rates of severe

³³ Roosa Tikkanen et al., *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, COMMONWEALTH FUND (Nov. 18, 2020), <https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries>.

³⁴ Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2019*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 21, 2021), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality-2021/maternal-mortality-2021.htm>.

³⁵ See *Pregnancy Mortality Surveillance System*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 25, 2020), <https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm> (for every 100,000 live births from 2014-2017, 13.4 non-Hispanic white women died of pregnancy-related causes compared to 41.7 non-Hispanic black women).

³⁶ YALE GLOB. HEALTH JUST. P'SHIP, WHEN THE STATE FAILS: MATERNAL MORTALITY AND RACIAL DISPARITY IN GEORGIA 16 (2018).

³⁷ Elizabeth Howell, *Reducing Disparities in Severe Maternal Morbidity and Mortality*, 61 CLINICAL OBSTETRICS & GYNECOLOGY 387, 387 (2018).

³⁸ YALE GLOB. HEALTH JUST. P'SHIP at 16.

³⁹ *Id.*

⁴⁰ See *Pregnancy Mortality Surveillance System*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 25, 2020), <https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm>.

⁴¹ Howell at 387.

⁴² *Id.*

maternal morbidity. Presently, black people are twice as likely as their white counterparts to suffer severe maternal morbidity.⁴³

Thus, while forcing gestation is always cruel, forcing *black* people to gestate is particularly cruel inasmuch as they are significantly more likely than their white counterparts to die or be severely injured during pregnancy, childbirth, or shortly thereafter. Thus, abortion prohibitions like SB8 have the effect of forcing black people to continue pregnancies in a country where people generally—and black people particularly—have poor chances of surviving the event relative to their counterparts in other industrialized nations.

It is important to note that most maternal deaths in the U.S. are preventable.⁴⁴ Accordingly, most maternal deaths—and most cases of severe maternal morbidity—should not be understood as an unfortunate but unavoidable consequence of pregnancy and childbirth. Instead, they are the result of a societal failure to guard the health of people who can become pregnant. Thus, the U.S.’s embarrassingly high maternal mortality ratio is a product of the nation’s failure to institute policies that will protect the lives of its citizens. There is a callous brutality involved in the choices of state legislatures to enact abortion restrictions and to compel childbirth while also doing nothing to ensure that people will survive the task that they have been coerced to perform.

C. Structural inequities that black people face exacerbate harms of abortion restrictions and contribute to systematic deprivation of black people’s constitutional right to abortion

Black people are more likely to live in poverty, experience domestic violence, and lack access to contraception and other basic health care services. These inequities contribute to black people’s higher rate of abortion, but also compound the barriers created by abortion restrictions on access to care. Abortion bans and restrictions create a cruel cycle from which black people are less likely to escape than their white counterparts. As a result, these laws have the distinct effect of depriving black people specifically of their constitutional right to abortion.

III. ACCESS TO ABORTION IS ESSENTIAL FOR REPRODUCTIVE JUSTICE

Feminists of color have long recognized the importance of ensuring that black women and other black people who can become pregnant are able to decide whether or not they will become parents. They have understood that there are forces that

⁴³ Andreea A. Creanga et al., *Racial and Ethnic Disparities in Severe Maternal Morbidity: A Multistate Analysis, 2008-2010*, 210 AM. J. OBSTETRICS & GYNECOLOGY 435.e1, 435.e6 (2014).

⁴⁴ *Pregnancy-related Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 7, 2019), <https://www.cdc.gov/vitalsigns/maternal-deaths/index.html>.

would compel black people into parenthood—like the forces that assert that abortion is black genocide.⁴⁵ They have also understood that there are forces that would deny black people parenthood—like the forces that subjected tens of thousands of black women to forced sterilizations from the 1950s to the 1980s.⁴⁶ Because feminists of color have realized that controlling black people’s reproduction has been a tool of racial oppression, they have identified black people’s ability to control their *own* reproduction as a tool of racial justice. Because the ability to terminate a pregnancy enables black people to control their reproduction, feminists of color consider abortion access to be essential to racial justice.

Despite recent suggestions⁴⁷, the abortion rate among black people is *not* a measure of the success that eugenicists have had among the black population in the U.S. Rather, the abortion rate among black people reflects the power of the forces that foist unintended pregnancy upon them. And, importantly, the abortion rate reflects black people’s defiance of those forces. It is a measure of black people’s insistence upon carrying a pregnancy to term *only* when they believe that they are ready for their lives to take that course.⁴⁸

To suggest that abortion today is in any way reminiscent of the eugenic practices of yesteryear is to disregard the concept of agency. Eugenics was about coercion; abortion in 2021 is about autonomy. Black people are autonomously choosing a form of healthcare that helps them negotiate the profound constraints that limit the fullness of their lives. That autonomy should be respected.

IV. THE REPRODUCTIVE JUSTICE FRAMEWORK CONTEMPLATES THE CENTRALITY OF ABORTION ACCESS TO RACIAL JUSTICE

In the 1990s, feminists of color created the reproductive justice framework as a response to the almost exclusive attention that the largest and most powerful reproductive rights organizations had given to abortion rights.⁴⁹ The black women who were the architects of the reproductive justice framework recognized that abortion rights were essential to racial justice and reproductive freedom. Nevertheless, they felt that affluent white activists’ narrow focus on abortion rights led the largest reproductive rights organizations to ignore or deprioritize *other* issues

⁴⁵ See *Our History*, SISTERSONG, TRUST BLACK WOMEN, <https://trustblackwomen.org/our-roots> (denying that “the oppression of black people should relegate black women to breeding machines with no right to make personal choices about family creation”) (last visited Sept. 17, 2021).

⁴⁶ Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 470–72 (2019).

⁴⁷ See, e.g., *Box v. Planned Parenthood of Indiana & Kentucky*, 139 S. Ct. 1780, 1790 (2019) (Thomas, J., concurring).

⁴⁸ See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (“[L]egal challenges to undue restrictions on abortion procedures ... center on a woman’s autonomy to determine her life course”).

⁴⁹ Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327, 328 (2013); ASIAN CMTYS. FOR REPROD. JUST., A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE 5 (2005), <https://forwardtogether.org/wp-content/uploads/2017/12/ACRJ-A-New-Vision.pdf>; see generally LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION (2017).

that impacted people’s reproductive lives and health.⁵⁰ Moreover, the issues that fell under the radar at these organizations tended to be the issues that did not affect affluent white women but rather affected people of color—especially poor people of color.⁵¹ While the creators of the reproductive justice framework recognized that abortion rights were crucial, they also recognized that the legal right to abortion did not represent the full universe of concerns that people faced with respect to their reproductive lives and health.

Importantly, the feminists of color who generated the reproductive justice framework understood that the state’s punitive regulation of black people’s reproduction—through laws and policies that prevent them from having children, coerce them into having children, or deny them the ability to raise the children that they have—was both a cause and an effect of racial subordination.⁵² Thus, the founders of the reproductive justice framework recognized the inextricable relationship between racial oppression and reproductive oppression.

The reproductive justice framework has three prongs—the right *not* to have a child, the right *to* have a child, and the right to parent a child with dignity.⁵³ Reproductive justice centers all three prongs simultaneously. This is to say: the right *not* to have a child is as important to reproductive justice as the right *to* have a child and the right to parent one’s child with dignity. Thus, the right to an abortion, a vital component of the right *not* to have a child, is an essential element of reproductive justice.

It deserves reiterating that feminists of color—black women, specifically—were the architects of the reproductive justice framework. Thus, black women who were committed to racial justice recognized the centrality of abortion rights to their lives and the lives of people like them. Eugenicists and other plotters of genocide have not thrust abortion rights on unwitting black women.⁵⁴ Quite the contrary, black women have demanded abortion rights for themselves. They have made these demands because they understand that freedom—for themselves, for their families, for their communities, for their race—is impossible without the ability to control their reproductive capacities.

V. CONCLUSION

This week’s arguments before the Supreme Court in two legal challenges to SB8 are set against the backdrop of a perhaps an even-more existential threat to the

⁵⁰ Luna & Luker at 333, 335.

⁵¹ See generally Jael Silliman et al., *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE* (2004).

⁵² See generally Dorothy Roberts, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (2d ed. 2017).

⁵³ Luna & Luker at 328, 338, 340.

⁵⁴ See Murray at 228 (characterizing Justice Thomas’ concurrence in *Box* as “a misleading and incomplete history in which he associated abortion with eugenics”).

right to access abortion. On December 1, the Supreme Court will hear oral arguments in *Dobbs v. Jackson Women’s Health Organization*, a challenge to Mississippi’s ban on abortion at 15 weeks of pregnancy. The Mississippi case poses a direct challenge to the nearly fifty years of precedent affirming the constitutional right to access abortion. If the Supreme Court allows Mississippi’s ban to go into effect, overturning *Roe* in the process, it will be giving states free reign to ban abortion outright. A recent study by the Guttmacher Institute found that if the U.S. Supreme Court were to weaken or overturn *Roe v. Wade*, 26 states would be certain or likely to ban abortion.⁵⁵

But even now, as the constitutional right to abortion remains intact, many states have managed to eliminate access to abortion within their borders. This crisis in access to abortion care in the United States highlights the need for a holistic and intersectional policy response that puts within its range of vision everything from the need for comprehensive paid family and medical leave to laws that tackle the climate crisis and protect the right to vote. This response must address the systemic conditions of inequality that disproportionately affect black people and compound the burdens of abortion restrictions. In this critical moment, we need the reproductive justice framework to inform policymaking so that we can ensure that people have all the necessary economic, social, and political supports to control their bodies, including when and whether to have children. Further, we should trust black women and black people who can become pregnant to do what is best for themselves, their families, and their communities.

⁵⁵ *If Roe v. Wade Falls: Travel Distance for People Seeking Abortion*, GUTTMACHER INST., <https://states.guttmacher.org/> (last visited Nov. 1, 2021); *What If Roe Fell?*, CTR. FOR REPROD. RIGHTS, <https://maps.reproductiverights.org/what-if-roe-fell> (last visited Nov. 1, 2021).