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# Abortion Costs and the Language of Torture

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## ABSTRACT

Following the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, several states imposed significant restrictions on abortion. Some of these states established medical exceptions that would allow a woman or any other pregnant person to receive an abortion only if they face "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced." This language highlights the extreme pain and suffering that pregnant people must experience to qualify for an abortion in some states. It also has a troubling past. It is the same language and threshold the United States used to justify the torture of detainees during the war on terror.

This essay recognizes the linguistic connection between abortion restrictions and the language of torture. Forcing pregnant people to suffer pain equivalent to torture as a condition for receiving reproductive care is a requirement of extraordinary violence. And yet, the Supreme Court's decision in Dobbs attaches no significance to this requirement or its attendant health costs. In response, this essay argues that these health costs should be considered by legislatures and courts when assessing abortion restrictions. Because rational basis review is now the legal standard for assessing restrictions on reproductive care, legislatures should be required to acknowledge the health costs to individuals, and courts should be required to verify that legislatures engaged in this review. The current absence of cost analysis and verification in rational basis review of abortion restrictions undermines the legitimacy of even this most deferential form of judicial scrutiny. This legal ignorance also highlights the continuing flaws and profound harms of the *Dobbs* decision.



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## INTRODUCTION

In *Dobbs v. Jackson Women's Health Org.*,[1] the U.S. Supreme Court held that "the people's elected representatives" may regulate or prohibit abortion, thereby overturning decades of legal precedent.[2] Since that polemic and pivotal decision, several states have adopted new legislation or reactivated old legislation to impose significant restrictions on reproductive care, including abortion.[3] In 2024, approximately fifteen states prohibit abortion following conception.[4] Another twenty-seven states prohibit abortion at later times but before fetal viability.[5]

Many of these states have established medical exceptions that would allow individuals to seek an abortion under narrow circumstances.[6] But even these exceptions are filled with their own exceptions—further narrowing their reach and

1. 597 U.S. 215 (2022).
2. *Id.* at 232 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").
3. *See generally* ELIZABETH DIAS & LISA LERER, THE FALL OF ROE: THE RISE OF A NEW AMERICA (2024) (describing the legal and political movement that led to *Dobbs*); ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION (Lee C. Bollinger & Geoffrey R. Stone eds., 2024) (describing the legal history behind *Dobbs* and its impact on women's rights and civil liberties).
4. Jacques Billeaud & Anita Show, *Arizona Can Enforce an 1864 Law Criminalizing Nearly All Abortions, Court Says*, TIMES HERALD (Apr. 10, 2024), https://www.timesherald.com/2024/04/09/arizona-can-enforce-an-1864-law-criminalizing-nearly-all-abortions-court-says/. *See, e.g.*, IDAHO CODE ANN. § 18-622 (West 2024); MISS. CODE ANN. § 41-41-45 (West 2024). This number continues to change as a result of legislation and judicial decisions. *See generally Abortion*, Annual Review, 24 GEO. J. GENDER & L. 201 (2023) (describing the changing landscape of abortion regulation in the United States); Adrienne R. Ghorashi & DeAnna Baumle, *Legal and Health Risks of Abortion Criminalization: State Policy Responses in the Immediate Aftermath of* Dobbs, 37 J.L. & HEALTH 1 (2023) (analyzing state laws impacting abortion access); *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state [https://perma.cc/7J6T-TMC2] (June 1, 2024) (same).
5. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions [perma.cc/W5JM-4ZAH].
6. *See* Mabel Felix, Laurie Sobel & Alina Salganicoff, *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KFF (June 6, 2024), https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services [https://perma.cc/DD6C-VF9F]; *see also* Tom Lininger, *Abortion, the Underground Railroad, and Evidentiary Privilege*, 80 WASH. & LEE L. REV. 663, 678 (2023) ("A portion of the states with abortion bans make exceptions for rape or incest, but approximately one dozen of the antiabortion states do not.").

limiting access to vital medical care.[7] As a result, many doctors are unable or unwilling to provide reproductive care, and patients are suffering from a lack of essential health care.[8]

In Texas, for example, criminal liability may be imposed on a person who performs an abortion.[9] There is a narrow medical exception to the prohibition.[10] An abortion is permissible if a woman faces "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced."[11] Because it imposes such a high threshold for eligibility, the statute has made access to abortion care exceedingly difficult in the state. In fact, it has effectively endowed Texas "with a morbid power over the lives and health of pregnant women."[12] The Texas statute has been applied with brutal efficiency, forcing pregnant people to flee the state in

7. Health exceptions are often narrowly drafted and interpreted to reduce the likelihood that they will swallow the rule. *See* Gail Glidewell, *"Partial Birth" Abortion and the Health Exception: Protecting Maternal Health or Risking Abortion on Demand?*, 28 FORDHAM URB. L.J. 1089, 1122 (2001).

8. *See* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 72–73 (2023) ("Even when a state has exceptions for the life and health of the pregnant person, they are notoriously vague or narrow, and, fearing liability under the state law, physicians have delayed medically necessary abortion care even though the patient's life is on the line."); Jamelle Bouie, Opinion, *When Pregnant Patients 'Become Radioactive to Emergency Departments,'* N.Y. TIMES (Apr. 20, 2024), https://www.nytimes.com/2024/04/20/opinion/abortion-ban-pregnancy-emergency.html [https://perma.cc/65QT-GCQM].

9. TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (West 2022); TEX. HEALTH & SAFETY CODE ANN. § 170A.004 (West 2022). Dissatisfied with criminal sanctions alone, Texas has also imposed civil liability on abortion providers and on individuals who assist someone in receiving an abortion. TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2021).

10. Despite repeated calls, the Texas Medical Board has declined to offer meaningful guidance on the medical exception. Eleanor Klibanoff, *Texas Medical Board Remains Silent on Abortion Laws, Despite Calls for More Guidance*, TEX. TRIB. (Dec. 21, 2023, 5:00 AM), https://www.texastribune.org/2023/12/21/texas-medical-board-abortion [https://perma.cc/A7JP-D298].

11. TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b)(2) (West 2022). By its terms, the Texas statute only applies to women. However, it could readily be applied to transgender men or nonbinary individuals. *See* Neelam Bohra, *"Left Out of the Conversation": Transgender Texans Feel the Impact of State's Restrictive Abortion Law*, TEX. TRIB. (Dec. 21, 2021, 5:00 AM), https://www.texastribune.org/2021/12/21/texas-abortion-law-transgender-pregnancy [https://perma.cc/MN5Y-24KQ].

12. Moira Donegan, Opinion, *Do Pregnant Women Have a Right to Urgent Medical Care? No, According to a US Court*, THE GUARDIAN (Jan. 10, 2024, 6:01 AM), https://www.theguardian.com/commentisfree/2024/jan/10/pregnant-women-urgent-medical-care-us-court-texas [https://perma.cc/SY2P-LVWJ].

search of reproductive care.[13] Yet, the statute has been reviewed without criticism or concern by both state and federal courts.[14] In fact, some judges and politicians have even blamed doctors for dramatizing the risks to pregnant people.[15]

Texas is not alone in enacting this type of draconian standard; similar abortion restrictions and medical exceptions have been adopted in many other states.[16] The consequences of these restrictions are profound. States can now force pregnant people "to endure ruptures of the uterus, organ prolapse, massive blood loss[,] and sepsis. They can force them to lose their fertility. And even in cases where—through luck and grace—none of this comes to pass, they can force these women [and other pregnant people] to wait, in fear and humiliation, for what fate has in store for them."[17]

The language in state statutes requiring pregnant people to face the serious risk of substantial impairment of a major bodily function to qualify for an abortion means that individuals must experience extreme suffering to receive vital medical

13. *See* Charlotte Alter, *How Kate Cox Became a Reluctant Face of the Abortion-Rights Movement*, TIME (Mar. 27, 2024, 12:06 PM), https://time.com/6960387/kate-cox-abortion-rights-interview [https://perma.cc/6XUW-4TCC]; Nadine El-Bawab, Tess Scott, Christina Ng & Acacia Nunes, *Delayed and Denied: Women Pushed to Death's Door for Abortion Care in Post-Roe America*, ABC NEWS (Dec. 14, 2023, 3:09 AM), https://abcnews.go.com/US/delayed-denied-women-pushed-deaths-door-abortion-care/story?id=105563255 [https://perma.cc/4N87-DYWQ].

14. Texas v. Becerra, 89 F.4th 529 (5th Cir. 2024); *In re* State, 682 S.W.3d 890 (Tex. 2023) (per curiam).

15. Mary Ziegler, *Texas' New Plan for Responding to the Horror of Its Abortion Ban: Blame Doctors*, SLATE (June 3, 2024, 5:24 PM), https://slate.com/news-and-politics/2024/06/texas-abortion-ban-horror-blame-doctors-medical-catastrophe.html [https://perma.cc/DS46-285P].

16. *State Bans on Abortion Throughout Pregnancy*, *supra* note 5; Mary Claire Bartlett, Note, *Physician Mens Rea: Applying* United States v. Ruan *to State Abortion Statutes*, 123 COLUM. L. REV. 1699, 1736–45 (2023) (outlining state statutes that ban abortion after fifteen weeks or earlier and the relevant criminal liability language for each).

17. Donegan, *supra* note 12.

care.[18] This statutory requirement also has a troubling past.[19] It is the same language the United States used to justify the torture of detainees during the war on terror.[20]

This essay considers the relationship between abortion restrictions and the language of torture.[21] Part I examines how the U.S. Department of Justice reverse-

18. Throughout history and in current times, the language of abortion addresses women. However, restrictions on abortions and reproductive care impose the same extraordinary violence on transgender and nonbinary individuals. Regardless of gender, every person who may become or is pregnant should be treated with equal dignity. Accordingly, this Article uses more inclusive language. *See* Brooke Migdon, *Yes, Abortion Bans Affect Transgender and Nonbinary People, Too*, CHANGING AMERICA (Apr. 6, 2022), https://thehill.com/changing-america/respect/equality/3261036-yes-abortion-bans-affect-transgender-and-nonbinary-people-too [https://perma.cc/JPB8-XWVA]. For a different and more critical perspective, see Michael Powell, *A Vanishing Word in Abortion Debate: "Women,"* N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/08/us/women-gender-aclu-abortion.html [https://perma.cc/E59E-KJ4G] (describing criticisms about the use of inclusive language in the abortion debate).

19. The federal Emergency Medical Treatment and Active Labor Act (EMTALA) includes a provision that requires hospitals receiving federal funding to provide emergency care regardless of an individual's ability to pay. 42 U.S.C. § 1395dd. Emergency care is defined to include cases involving the serious impairment of any bodily function. *Id.* § 1395dd(e)(1)(A)(ii). While EMTALA's language is similar to that used by states that regulate abortion access, there are significant differences. For example, EMTALA applies in cases involving the "serious dysfunction of any bodily organ or part" rather than a major bodily function. *Id.* § 1395dd(e)(1)(A)(iii). And, more broadly, EMTALA applies to any medical condition that places "the health of the individual . . . in serious jeopardy." *Id.* § 1395dd(e)(1)(A)(i). EMTALA's application in the face of state abortion restrictions was subject to U.S. Supreme Court review, but the Court dismissed the petition for certiorari as improvidently granted. Moyle v. United States, 144 S. Ct. 2015 (2024) (Mem.).

20. Scholars have previously argued that the failure to provide reproductive care may constitute cruel, inhuman, or degrading treatment—potentially even torture. *See, e.g.*, Marisa S. Cianciarulo, *For the Greater Good: The Subordination of Reproductive Freedom to State Interests in the United States and China*, 51 AKRON L. REV. 99, 105–06 (2017) ("The U.N. Committee against Torture found that the failure to provide access to legal abortion amounts to cruel and inhuman treatment."); Sarah Helena Lord, *The Nicaraguan Abortion Ban: Killing in Defense of Life*, 87 N.C. L. REV. 537, 604 (2009) ("In particular, the U.N.'s Human Rights Committee ('HRC') has noted a correlation between laws that restrict abortion and situations in which women have been subjected to cruel, inhuman, or degrading treatment."); Alyson Zureick, *(En)gendering Suffering: Denial of Abortion as a Form of Cruel, Inhuman, or Degrading Treatment*, 38 FORDHAM INT'L L.J. 99, 102 (2015) ("[I]n certain circumstances, acts by public or private individuals to deny or obstruct a woman's access to abortion can cause such severe pain or suffering that they amount to cruel, inhuman, or degrading treatment . . . ."); *see generally* RONLI SIFRIS, REPRODUCTIVE FREEDOM, TORTURE AND INTERNATIONAL HUMAN RIGHTS (2014).

21. Language and legal terminology can be used to both clarify and obscure. During the war on terror, for example, euphemisms were often used to hide and justify the mistreatment of human beings. *See* Margot Williams, *At Guantánamo Bay, Torture Apologists Take Refuge in Empty Code Words and Euphemisms*, TRANSCEND MEDIA SERV. (Feb. 3, 2020),

engineered legal opinions justifying the abusive treatment of detainees during the war on terror by stating that only individuals who faced the level of pain that would ordinarily be associated with the substantial impairment of a major bodily function could be considered victims of torture.[22] Part II then examines how the "impairment of a major bodily function" standard has been used by states to restrict access to reproductive care—forcing pregnant people to suffer pain equivalent to torture as a condition for receiving an abortion.[23] Despite the extraordinary pain and suffering people must now endure to qualify for reproductive care, the Supreme Court's decision in *Dobbs* attaches no significance to this requirement or its attendant health costs to pregnant people.[24] Accordingly, Part III of this essay argues that these health costs—which include both physical and mental harm—should be considered by legislatures and courts.[25]

Because of *Dobbs*, the struggle for reproductive rights will now be fought within the realm of rational basis review.[26] Accordingly, legislatures should be

https://www.transcend.org/tms/2020/02/at-guantanamo-bay-torture-apologists-take-refuge-in-empty-code-words-and-euphemisms [https://perma.cc/8DXR-TH3U] (originally published in The Intercept).

22. *See infra* notes 31–44 and accompanying text.

23. There are several elements required to establish torture under U.S. and international law. This essay focuses on the pain and suffering threshold. *See* THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL 23, 42 (Manfred Nowak, Moritz Birk & Giuliana Monina eds., 2d ed. 2019).

24. *See generally* Elizabeth Tobin-Tyler, *Putting Your Money Where Your Mouth Is: Maternal Health Policy After* Dobbs, 53 SETON HALL L. REV. 1577 (2023).

25. Even without complications, the physical toll of pregnancy is significant. *See* Ross Douthat, Opinion, *What Do the Physical Costs of Pregnancy Mean for the Abortion Debate?*, N.Y. TIMES (Oct. 5, 2022), https://www.nytimes.com/2022/10/05/opinion/pregnancy-abortion-dobbs.html [https://perma.cc/5VY5-9HCV]; Carl Zimmer, *Scientists Calculated the Energy Needed to Carry a Baby. Shocker: It's a Lot*, N.Y. TIMES (May 16, 2024), https://www.nytimes.com/2024/05/16/science/pregnancy-energy-costs.html [https://perma.cc/ANT7-73XM]. In addition, persons who are denied access to abortions experience negative mental health outcomes. Press Release, American Psych. Ass'n, Restricting Access to Abortion Likely to Lead to Mental Health Harms, APA Asserts (May 3, 2022), https://www.apa.org/news/press/releases/2022/05/restricting-abortion-mental-health-harms [https://perma.cc/3P3B-87CM]. Significantly, these laws have a disproportionate impact on individuals "living in poverty, people of color, and sexual and gender identity minorities, as well as those who live in rural or medically underserved areas." *Id.*; *see also* Christina Caron, *Does Being Denied an Abortion Harm Mental Health?*, N.Y. TIMES (June 22, 2023), https://www.nytimes.com/2022/05/24/well/mind/abortion-access-mental-health.html [https://perma.cc/AQ4T-32KR].

26. Matthew D. Mitchell & Anastasia P. Boden, *Irrational Basis*, DISCOURSE (Aug. 5, 2022), https://www.discoursemagazine.com/p/irrational-basis [https://perma.cc/N4A6-REDJ] (noting that the physical and mental toll of childbirth on women is conspicuously absent in abortion decisions); *see also* Ed Whelan, Dobbs *and Rational-Basis Review*, NAT'L REV. (June

required to acknowledge the health costs to pregnant people, and courts should be required to verify that legislatures engaged in this review.[27] This essay works within the framework of rational basis review to generate both rhetorical and legal arguments in support of reproductive rights.[28]

## I. A TROUBLING PAST: REQUIRING THE IMPAIRMENT OF A MAJOR BODILY FUNCTION

During the height of the war on terror, the Office of Legal Counsel (OLC) in the Department of Justice released a series of legal opinions seeking to justify the abusive treatment of detainees.[29] At the time, the United States was operating a clandestine rendition, detention, and interrogation program involving "high-value detainees" who were alleged members of Al Qaeda.[30] These detainees were subjected to a set of enhanced interrogation techniques, which included waterboarding, stress positions, physical assault, cramped confinement, and sleep deprivation.[31] Because they recognized the extreme nature of these techniques, government officials requested the OLC to address the potential criminal liability of military and civilian personnel engaged in the detention and interrogation of these detainees.

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24, 2022, 10:27 AM), https://www.nationalreview.com/bench-memos/dobbs-and-rational-basis-review [https://perma.cc/9AQD-JSA6].

27. *See generally* F. Laguardia, *Pain That Only She Must Bear: On the Invisibility of Women in Judicial Abortion Rhetoric*, J.L. & BIOSCIENCES, Jan.–June 2022, at 1.

28. *Visioning New Futures for Reproductive Justice Declaration 2023*, SISTERSONG (Sept. 24, 2024, 5:00 p.m.), https://www.sistersong.net/visioningnewfuturesforrj [https://perma.cc/UT24-3W3T] ("When we fight for reproductive justice—we show up for people who are harmed the most."). Some states have even attempted to prohibit discussions of abortion by medical professionals. Such efforts have been rejected by federal courts. *See* Linda Greenhouse, Guest Essay, *Is There a Constitutional Right to Talk About Abortion?*, N.Y. TIMES (May 17, 2024), https://www.nytimes.com/2024/05/17/opinion/speech-abortion-supreme-court.html [https://perma.cc/ABL4-57K6]; *see generally* Samantha Mitchell, *First Amendment Speech Protections in a Post-*Dobbs *World: Providing Instruction on Instructional Speech*, 91 FORDHAM L. REV. 1521 (2023).

29. *See generally* THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (David Cole ed., 2009); JAMEEL JAFFER & AMRIT SINGH, ADMINISTRATION OF TORTURE: A DOCUMENTARY RECORD FROM WASHINGTON TO ABU GHRAIB AND BEYOND (2007); THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

30. ALI H. SOUFAN, THE BLACK BANNERS: THE INSIDE STORY OF 9/11 AND THE WAR AGAINST AL-QAEDA 378 (2011); JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 140 (2008).

31. *See generally* S. REP. NO. 113-288 (2014); Robert Knowles, *Torture and Institutional Design*, 130 YALE L.J. F. 249 (2020); Ruth Blakeley, *Dirty Hands, Clean Conscience? The CIA Inspector General's Investigation of "Enhanced Interrogation Techniques" in the War on Terror and the Torture Debate*, 10 J. HUM. RTS. 544 (2011).

Requested by the White House, the OLC issued its first memorandum in August 2002 to address the standards of conduct that could give rise to criminal liability under the federal torture statute.[32] To constitute torture under federal law, victims must experience "severe physical or mental pain or suffering."[33] In an effort to insulate the government's actions from criminal liability, the OLC sought to distinguish the treatment of detainees by asserting that their pain was insufficient and did not rise to the requisite level required by the federal torture statute.[34] While the statute did not define what was sufficiently "severe," the OLC determined that the requisite pain or suffering "must be of such a high level of intensity that the pain is difficult for the subject to endure."[35]

To support this conclusion, the OLC examined the use of the phrase "severe pain" in other federal statutes. It argued that these statutes could "shed more light" on the meaning of the phrase "severe pain" as used in the federal torture statute.[36] The OLC noted the phrase "appears in statutes defining an emergency medical condition for the purpose of providing health benefits."[37] Referencing the pain thresholds in these statutes, the OLC argued that a victim's "'severe pain' . . . must rise to . . . the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions."[38] According to the OLC, only such "intense" and "excruciating pain" constituted pain severe enough to give rise to torture and, therefore, to generate criminal liability under federal law.[39]

At the request of the U.S. Department of Defense, the OLC issued a subsequent memorandum in March 2003 to examine "the legal standards

32. Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, for Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) (on file with author) [hereinafter 2002 Bybee Memorandum]; *see also* Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, for John Rizzo, Acting General Counsel of the Central Intelligence Agency (Aug. 1, 2002) (on file with author).

33. 18 U.S.C. § 2340(1). Criminal liability is imposed on those who commit or attempt to commit torture. *Id.* § 2340A(a). The statute also imposes criminal liability for severe mental pain or suffering. *Id.* § 2340(2), § 2340A(a). The OLC memorandum addressed this issue separately. 2002 Bybee Memorandum, *supra* note 32, at 6–13.

34. 2002 Bybee Memorandum, *supra* note 32, at 1.

35. *Id.* at 5.

36. *Id.*

37. *Id.* at 5–6 (citing "8 U.S.C. § 1369 (2000); 42 U.S.C § 1395w-22 (2000); *id.* § 1395x (2000); *id.* § 1395dd (2000); *id.* § 1396b (2000); *id.* § 1396u-2 (2000)").

38. 2002 Bybee Memorandum, *supra* note 32, at 6. The OLC also relied on several dictionaries to determine the meaning of "severe pain." *Id.* at 5, 6 n.3.

39. *Id.* at 13 (quotations omitted). While the relevant federal law defined torture to include both pain and suffering, the OLC did not consider them to be distinct concepts. *Id.* at 6 n.3.

governing military interrogations of alien unlawful combatants held outside the United States."[40] In its analysis, the OLC again referenced federal statutes that used the phrase "severe pain" in "defining an emergency medical condition for the purpose of providing health benefits."[41] While it acknowledged that these statutes addressed different factual scenarios, the OLC determined they were "nonetheless helpful for understanding what constitutes severe physical pain."[42]

In this memorandum, the OLC reiterated that "[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result."[43] To constitute torture, the OLC argued that a victim must suffer "'intense pain' or 'excruciating pain,' or put another way, 'extreme anguish of body or mind.'"[44] By imposing such a high threshold for pain and suffering, the OLC was able to conclude that the abusive treatment of detainees did not constitute torture and, therefore, the treatment was not prohibited by U.S. or international law.[45]

The OLC's interpretation of torture was so extreme that it was soon criticized by its own attorneys.[46] As a result, the OLC eventually withdrew both opinions.[47] In December 2004, the OLC issued a memorandum that provided a different interpretation of the relevant legal standards. According to the OLC's new analysis, requiring physical pain or suffering that is associated with the loss of

40. Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, for William J. Haynes II, General Counsel, Department of Defense 1 (Mar. 14, 2003) (on file with author).
41. *Id.* at 38 ("[These statutes] treat severe pain as an indicator of ailments that are likely to result in permanent and serious physical damage in the absence of immediate medical treatment.").
42. *Id.*
43. *Id.* at 45.
44. *Id.*
45. *But see* William J. Aceves, United States v. George Tenet*: A Federal Indictment for Torture*, 48 N.Y.U. J. INT'L L. & POL. 1, 11 (2015) (arguing that mistreatment of detainees constituted torture and gave rise to criminal liability).
46. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 144–60 (2007) (critiquing policy by a former Assistant Attorney General from the OLC); *see also* Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES MAG. (Sept. 9, 2007), https://www.nytimes.com/2007/09/09/magazine/09rosen.html [https://perma.cc/CW7Y-7K26].
47. Memorandum from Daniel L. Levin, Acting Assistant Attorney General, Office of Legal Counsel, for the Deputy Attorney General 297–98 (Dec. 30, 2004), https://www.justice.gov/file/18791/download [https://perma.cc/JYY5-Y63Y] [hereinafter 2004 OLC Memorandum]; *see also* Letter from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to William J. Haynes II, General Counsel, Department of Defense (Feb. 4, 2005), https://www.justice.gov/sites/default/files/olc/legacy/2009/12/30/aclu-ii-020405.pdf [https://perma.cc/PVG3-GAPM].

significant bodily functions was not the appropriate standard for establishing torture under U.S. or international law.[48] It also acknowledged that the previously referenced health care statutes were irrelevant to this analysis.[49] Certainly, pain or suffering equivalent to the loss of significant bodily functions would constitute torture.[50] But according to the OLC, "excruciating and agonizing" pain was not required; "lesser" forms of pain or suffering could also constitute torture.[51] In addition, the OLC clarified that torture is not limited to "severe physical pain;" it also includes "severe physical suffering."[52] It determined that "severe physical suffering" involves "physical distress that is 'severe' considering its intensity and duration or persistence, rather than merely mild or transitory."[53]

By withdrawing its earlier opinions, the OLC acknowledged that the threshold for pain and suffering it had previously used to assess whether detainees were subjected to torture was legally flawed.[54] The OLC also reaffirmed that torture was contrary to American law and values.[55] In subsequent legal opinions addressing the appropriate standards of detainee treatment, the OLC never again relied upon its prior reasoning.[56] When the earlier opinions were released to the

48. 2004 OLC Memorandum, *supra* note 32, at 298–99.
49. *See id.* at 304 n.17. The OLC acknowledged that the federal statutes relied upon in the earlier memoranda "do not . . . provide a proper guide for interpreting 'severe pain.'" *Id.* at 305 n.17. In fact, "[t]hey do not define 'severe pain' even in that very different context (rather, they use it as an indication of an 'emergency medical condition'), and they do not state that death, organ failure, or impairment of bodily function cause 'severe pain,' but rather that 'severe pain' may indicate a condition that, if untreated, could cause one of those results." *Id.*
50. Acknowledging the difficulty in defining torture, the OLC noted that there is "no clear, objective, consistent measurement" of pain. *Id.* at 305 n.18 (citing research that indicates "[p]ain is a subjective experience and there is no way to objectively quantify it").
51. *Id.* at 297, 303, 304 n.17.
52. *Id.* at 307–09.
53. *Id.* at 309.
54. *See id.* at 298.
55. *Id.* at 297.
56. While the OLC no longer relied on the renounced opinions, it found other ways to justify the abusive treatment of detainees. *See, e.g.*, Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 30, 2005), https://justice.gov/olc/file/886281/download [https://perma.cc/ZF7W-9VJA]; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005), https://justice.gov/olc/file/886271/download [https://perma.cc/APF7-P9FM] (addressing the legality of individualized use of interrogation techniques on detainees); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005),

public, they were described by scholars as both legally "bizarre" and "an ethical train wreck."[57] As explained by Professor David Luban, the authors of the OLC opinions "were obviously looking for a standard of torture so high that none of the enhanced interrogation techniques would count."[58] Professor M. Cathleen Kaveny condemned the opinions for reflecting a "distorted moral reasoning."[59] According to Professor Harold Koh, the opinions conveyed multiple failures and were clearly erroneous.[60]

To constitute torture, the OLC memos originally argued that a victim's "'severe pain' . . . must rise to . . . the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions."[61] The OLC's own lawyers eventually rejected this distorted reasoning.[62] It is striking, therefore, that many states have

https://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury 2005-2.pdf. [https://perma.cc/6MWT-27YW] (addressing the legality of concurrent use of interrogation techniques on detainees).

57. *What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Hearing Before the Subcomm. on Admin. Oversight & the Cts. of the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of David Luban, Professor of Law, Georgetown University Law Center) [hereinafter Luban Statement]; *see also* Oona A. Hathaway, Aileen Nowlan & Julia Spiegel, *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT'L L. 791, 792 (2012) ("These memos concluded that the U.S. prohibition on torture only 'proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering,' where 'severe pain' is equivalent in intensity to the pain 'associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions.' Once leaked to the public, this narrow definition of torture met with intense criticism."); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. L. & POL'Y 455, 458 (2005) ("The Bybee Memorandum purported to provide objective legal advice to government decisionmakers. Nevertheless, its assertions about the state of the law are so inaccurate that they seem to be arguments about what the authors (or the intended recipients) wanted the law to be rather than assessments of what the law actually is.") (footnote omitted); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1708 (2005); Anthony Lewis, *Making Torture Legal*, N.Y. REV. (July 15, 2004), https://www.nybooks.com/articles/2004/07/15/making-torture-legal [https://perma.cc/WH5L-W6XZ]. *But see* Carrie L. Flores, *Unfounded Allegations That John Yoo Violated His Ethical Obligations as a Lawyer: A Critical Analysis of the Torture Memo*, 25 BYU J. PUB. L. 1 (2011) (arguing that criticisms of the torture memos are unfounded).

58. Luban Statement, *supra* note 57, at 5.

59. M. Cathleen Kaveny, *Prophecy and Casuistry: Abortion, Torture and Moral Discourse*, 51 VILL. L. REV. 499, 555 (2006).

60. Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 647 (2005) ("[I]n my professional opinion, the Bybee Opinion is perhaps the most clearly erroneous legal opinion I have ever read. The opinion has [multiple] obvious failures.").

61. 2002 Bybee Memorandum, *supra* note 32, at 6.

62. GOLDSMITH, *supra* note 46, at 151 (noting the legal opinions were "legally flawed, tendentious in substance and tone, and overbroad").

adopted the same abandoned OLC threshold for assessing the eligibility of people seeking access to reproductive care.[63]

## II. AN AGONIZING PRESENT

Pursuant to *Dobbs*, the people's elected representatives are now empowered to regulate or prohibit abortion.[64] In some states, elected representatives have essentially determined that a pregnant person who seeks an abortion must suffer pain or that is equivalent to torture as a condition for receiving care. In other states, elected representatives have concluded that a pregnant person's pain or suffering is irrelevant in determining whether they may have access to reproductive care. In the years since *Dobbs* was announced, the consequences of this legal ambivalence to human suffering have been cruel and devastating.

In Texas, for example, the draconian nature of the state's abortion prohibition, along with its troubling pain threshold, has generated a dystopian landscape for women and other pregnant people.[65] The story of Kate Cox reveals the cruelty of Texas law. A mother of two children, Cox discovered that her third pregnancy was in serious trouble.[66] Her fetus was diagnosed with a genetic anomaly that would result in almost certain death.[67] The pregnancy also threatened Cox's own health as well as her future fertility.[68] Accordingly, her doctors recommended that she terminate her pregnancy. To ensure that neither she nor her medical team would be subject to civil or criminal liability, Cox filed a civil action seeking to confirm her right to terminate her pregnancy.[69]

A state trial court judge granted her petition, but Texas officials quickly appealed the ruling.[70] They also threatened her health providers with legal action

63. Shirley Henderson, *Aftershocks: Navigating the Morass of State Abortion Laws Post-*Roe, ABA MAG. 45 (Dec. 2022–Jan. 2023).
64. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022).
65. *See* El-Bawab, Scott, Ng & Nunes, *supra* note 13; Greer Donley, Opinion, *What Happened to Kate Cox is Tragic, and Completely Expected*, N.Y. TIMES (Dec. 17, 2023), https://www.nytimes.com/2023/12/17/opinion/kate-cox-abortion-texas-exceptions.html [https://perma.cc/F44L-NYKN].
66. Eleanor Klibanoff, *Kate Cox's Case Reveals How Far Texas Intends to Go to Enforce Abortion Laws*, TEX. TRIB. (Dec. 13, 2023, 5:00 AM), https://www.texastribune.org/2023/12/13/texas-abortion-lawsuit [https://perma.cc/6BV6-9J8D].
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*

if they performed the abortion.[71] While the case was pending before the Texas Supreme Court, Cox was forced to leave the state to terminate her pregnancy and receive vital medical care.[72] Acknowledging the difficult decision to end her pregnancy, Cox noted that "[t]he alternative would have been worse . . . . I didn't want to have to wait until my baby died in my belly, or died during birth, or have to hold her in my arms as she suffocates or has a heart attack."[73]

When the Texas Supreme Court finally issued its decision in the case, it acknowledged the high threshold for abortion access set forth in Texas law.[74] It also indicated that even serious difficulties in pregnancy may not justify an exception to the abortion prohibition.[75] In rejecting Cox's claim, the Texas Supreme Court blamed her doctors for failing to attest that her "condition poses the risks the exception requires."[76] While the Court asserted that medical professionals had the discretion and authority to make these decisions, it noted that the Texas Medical Board could "do more to provide guidance in response to any confusion that currently prevails."[77] In a subsequent opinion, the Texas Supreme Court rejected a challenge to the state's abortion ban.[78]

The cruelty generated by *Dobbs* extends far beyond Texas. In Arizona, the state Supreme Court held that the *Dobbs* decision had activated an antiquated state statute regulating abortion.[79] The statute prohibited abortions after conception unless necessary to save the life of the mother, and there were no exceptions for rape or incest.[80] Additionally, physicians could be subject to criminal liability for performing an abortion.[81]

The consequences of the Arizona state court's decision were immediate. As described by Professor Caitlin Millat, an Arizona law professor who was pregnant at the time of the Arizona Supreme Court decision and who had previously

71. *Id.*
72. *Id.*
73. Alter, *supra* note 13.
74. In re State, 682 S.W.3d 890, 892–93 (Tex. 2023).
75. *Id.*
76. *Id.* at 893.
77. *Id.* at 894 (footnote omitted).
78. State v. Zurawski, 690 S.W.3d 644 (Tex. 2024). *See* Kate Zernike, *Texas Supreme Court Rejects Challenge on Exceptions to Abortion Ban*, N.Y. TIMES (May 31, 2024), https://www.nytimes.com/2024/05/31/us/texas-abortion-ban-supreme-court.html [https://perma.cc/RE7M-MRHB].
79. *See* Jack Healy & Kellen Browning, *Arizona Reinstates 160-Year-Old Abortion Ban*, N.Y. TIMES (Apr. 9, 2024), https://www.nytimes.com/2024/04/09/us/arizona-abortion-ban.html [https://perma.cc/FGR3-XXC9].
80. *See id.*
81. Planned Parenthood Ariz., Inc. v. Mayes, 545 P.3d 892, 905 (Ariz. 2024).

suffered a miscarriage, the decision generated profound uncertainty and was deeply unsettling: "What qualifies under the majority's sole exception permitting abortions 'to save a woman's life?' How close to death would I need to be in the coming weeks to trigger this protection? And who would make that call?"[82] She also directed pointed remarks to the three male justices of the Court's majority. "They will not have to feel the loss of personhood," she wrote, "They will not have to plot a trip across state lines to access healthcare they may need. They will not be forced to set aside their bodily autonomy. And they will not be forced to choose what could be an agonizing life for their unborn child."[83] In the face of withering criticism, the Arizona legislature eventually repealed the statute.[84]

In Idaho, abortion is now prohibited upon conception and only a narrow set of exceptions exist.[85] While the abortion ban has been the subject of extensive litigation,[86] the personal consequences have been catastrophic. Pregnant people facing obstetric emergencies have been forced to leave the state because their doctors refused to provide medical care.[87] One woman who was refused medical care during her pregnancy despite significant pain and bleeding recalled asking her doctor, "If I need saving, you're not going to help me?"[88] His response was chilling: "He told me he wasn't willing to risk his 20-year career."[89] As a result, she was evacuated to Utah where doctors performed an emergency abortion and saved her life.[90] Another consequence of the Idaho law has been the exodus of medical

82. Caitlin Millat, Opinion, *As a Pregnant Law Professor in Arizona, I Fear the Abortion Ban*, L.A. TIMES (Apr. 11, 2024, 10:45 AM), https://www.latimes.com/opinion/story/2024-04-11/arizona-abortion-ban-republicans [https://perma.cc/Y77S-HPGT].
83. *Id.*
84. *See* Anna Betts & Colbi Edmonds, *What We Know About Arizona's Abortion Battle*, N.Y. TIMES (May 3, 2024), https://www.nytimes.com/article/arizona-abortion-ban.html [https://perma.cc/47L5-4MP3].
85. *Interactive Map: U.S. Abortion Policies and Access After Roe*, GUTTMACHER INST. (Sept. 10, 2024), https://states.guttmacher.org/policies/idaho/abortion-policies [https://perma.cc/WM48-U3EJ] (describing abortion policies in Idaho).
86. *See, e.g.*, KREM 2 News, Another *Lawsuit Filed in District Court Against Idaho's Abortion Ban*, YOUTUBE (June 7, 2024), https://youtu.be/LvXgMvpVN-A?feature=shared [https://perma.cc/C57H-9JBA].
87. *E.g.*, Kate Zernike, *She Needed an Emergency Abortion. Doctors in Idaho Put Her on a Plane*, N.Y. TIMES (June 28, 2024), https://www.nytimes.com/2024/06/28/us/emergency-abortion-idaho-mother.html [https://perma.cc/TZS5-7MRQ].
88. Zernike, *supra* note 87.
89. *Id.*
90. *Id.* This phenomenon is not unique to Idaho. *See* Bouie, *supra* note 8; Peter Slevin, *One of the Last Abortion Doctors in Indiana*, NEW YORKER (Feb. 25, 2024), https://www.newyorker.com/news/persons-of-interest/one-of-the-last-abortion-doctors-in-indiana [https://perma.cc/B7CJ-JBLD].

professionals from the state. Since Idaho's abortion ban took effect, many specialists in fetal care have fled the state, fearing the potential of civil and criminal sanctions.[91]

These stories of extraordinary pain and suffering are the legacy of *Dobbs*.[92] They reveal the linguistic connection between abortion restrictions and the language of torture. They also reflect the consequences of allowing the people's elected representatives to legislate without any consideration of the pain that would follow. By requiring pregnant people to suffer pain equivalent to torture as a condition for accessing reproductive care, individuals are forced to experience the most extreme form of human suffering.

## III. A DANGEROUS FUTURE: SHOULD RATIONAL BASIS REVIEW CONSIDER THE COSTS OF ABORTION RESTRICTIONS?

For decades, critics of abortion have used the rhetoric of violence to challenge this essential form of health care.[93] They argue that abortion is an act of violence against the fetus. This essay takes a different approach. Forcing pregnant people to suffer pain that is equivalent to torture to receive reproductive care is a

91. Chuck Malloy, *U.S. Supreme Court to Decide if Idaho's Abortion Law Goes Too Far*, IDAHO CAP. SUN (Apr. 30, 2024), https://idahocapitalsun.com/2024/04/30/u-s-supreme-court-to-decide-if-idahos-abortion-law-goes-too-far [https://perma.cc/77J5-J9AJ].

92. There are many more stories. *See, e.g.*, Kate Zernike, *The Unlikely Women Fighting for Abortion Rights*, N.Y. TIMES (May 27, 2024), https://www.nytimes.com/2024/05/27/us/abortion-women-tfmr.html [https://perma.cc/K5ED-XSP8]; Livia Follet, Tallulah Costa & Alexa Schnur, *Our Abortion Stories: "Many Women Are Not Able to Travel and Are Forced to Continue Pregnancies. We Must Remember Them"*, MS. (May 15, 2024), https://msmagazine.com/2024/05/15/abortion-stories-mississippi-roe-v-wade [https://perma.cc/AJ47-KCME]; Catherine Lucey, *The Tragic Pregnancy Stories Filling the Abortion Campaign Airwaves*, WALL ST. J. (Apr. 27, 2024, 10:00 AM), https://www.wsj.com/politics/policy/the-tragic-pregnancy-stories-filling-the-abortion-campaign-airwaves-74c4fa41 [https://perma.cc/X6JE-LMTY].

93. *See, e.g.*, Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes*, N.Y. TIMES (June 21, 2023), https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html [https://perma.cc/9FS2-QAS4]; Jeff Jacoby, *'Unplanned' Tells an Essential Truth About Abortion: It Is Violent*, BOS. GLOBE (May 3, 2019, 3:58 PM), https://www.bostonglobe.com/opinion/2019/05/03/unplanned-tells-essential-truth-about-abortion-violent/E3mCOyHJqiBQSJ7Nb5WUHO/story.html [https://perma.cc/QW74-8QUL]; George J. Annas, *Trust, Brutality, and Human Dignity: How "Partial Birth Abortion" Helps Shape American Biopolitics*, 48 AM. J.L. & MED. 173, 175 (2022) (discussing how the debate over certain obstetric procedures was framed in the language of violence and barbarity); Ruth Colker, *Abortion and Violence*, 1 WM. & MARY J. WOMEN & L. 93, 95 (1994) (describing how the rhetoric of violence was used against those who chose abortion).

requirement of extraordinary violence.[94] Yet, neither this requirement nor its attendant costs have been considered by the Supreme Court. In fact, the Court has never addressed the threshold of pain or suffering that pregnant people must endure to be constitutionally eligible for reproductive care.[95] Now that states can prohibit abortion at any stage of pregnancy, the Court will no longer be able to avoid this issue.

### A. Considering Costs Before *Dobbs*

In both *Roe v. Wade*[96] and *Planned Parenthood v. Casey*,[97] the Supreme Court upheld abortion access as a constitutional right. Yet, the tests enunciated by those decisions—the trimester framework in *Roe* and the undue burden standard in *Casey*—did not explicitly require courts to consider the health costs or the corresponding thresholds of pain or suffering that pregnant people must endure to obtain an abortion.[98] The undue burden standard was limited to assessing whether health regulations had "the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion."[99] Applying this standard in *Gonzales v. Carhart*,[100] the Court identified the existence of a potential health cost to pregnant people if an obstetric procedure used in some abortions was prohibited by federal law.[101] However, the Court noted that there was purported medical uncertainty over the health benefits of the procedure.[102] Because there was uncertainty, the

94. *See, e.g.*, Mary E. Fleming, *The Ethics of Abortion Ban Exceptions: Is the "Life-Threatening" Exception Threatening Lives?*, 107 MINN. L. REV. 126 (2023); Payal Shah & Akila Radhakrishnan, *It's Time to Call Abortion Bans What They Are—Torture and Cruelty*, THE NATION (June 9, 2023), https://www.thenation.com/article/society/abortion-bans-torture-cruelty [https://perma.cc/VD5H-ZKY2]; Matt Ford, *How Texas Tried to Torture a Woman for Being Pregnant*, NEW REPUBLIC (Dec. 12, 2023), https://newrepublic.com/article/177471/ken-paxton-kate-cox-abortion [https://perma.cc/4GC9-2QNX]; *see generally* DIANA GREENE FOSTER, THE TURNAWAY STUDY (2020).

95. Sonia M. Suter, *Alito is Wrong: We* Can *Assess the Impact of* Dobbs, *and It Is Bad for Women's Health*, 53 SETON HALL L. REV. 1477, 1537 (2023) (noting the Supreme Court "might be wary about explicitly stating that women can die or suffer serious illness to save fetuses.").

96. 410 U.S. 113 (1973).

97. 505 U.S. 833 (1992).

98. *But see* MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA 119 (2020) ("*Casey* put the costs and benefits of both abortion and laws regulating it at the center of constitutional discourse.").

99. *Planned Parenthood*, 505 U.S. at 878.

100. 550 U.S. 124 (2007).

101. In *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court had previously struck down a similar state statute because it posed an undue burden on a person's right to have an abortion.

102. *Gonzales*, 550 U.S. at 162–63 (noting competing claims by medical professionals on the alleged health benefits of the disputed procedure).

Court indicated it should defer to the legislature.[103] Thus, it declined to consider the potential health costs to pregnant people if the disputed procedure was prohibited.

In *Whole Woman's Health v. Hellerstedt*,[104] the Supreme Court appeared to incorporate a cost-benefit feature into the undue burden standard.[105] According to the Court, the undue burden standard set forth in *Casey* "requires that courts consider the burdens a law imposes on abortion access *together with the benefits those laws confer*."[106] The focus of the benefit analysis would be on the purported medical benefits created by abortion regulations.[107] Four years later, however, the Court rejected this standard. In *June Medical Services, LLC v. Russo*,[108] a majority of the Court rejected the assertion that courts should weigh the "costs and benefits of an abortion regulation."[109] Some Justices rejected the assertion that *Casey* authorized cost-benefit analysis as part of the undue burden standard.[110] Other Justices expressed broader concerns with cost-benefit analysis in judicial review, arguing that it offers little guidance to courts and allows judges to apply their own subjective preferences.[111]

### B. Considering Costs in *Dobbs*

In *Dobbs*, the Supreme Court overturned decades of precedent protecting abortion as a fundamental right and held that restrictions on abortion are subject to only rational basis review.[112] According to the Court, "[a] law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of

103. *Id.* at 163–64.
104. 579 U.S. 582 (2016).
105. Noah Feldman, Opinion, *Will Cost-Benefit Test Be New Tool for Abortion Foes?*, CHI. TRIB. (May 11, 2019, 8:27 AM), https://www.chicagotribune.com/opinion/commentary/ct-abortion-restrictions-texas-supreme-court-20160627-story.html [https://perma.cc/87MY-RJWY].
106. *Whole Woman's Health*, 579 U.S. at 607 (emphasis added).
107. *See id.* at 591.
108. 591 U.S. 299 (2020).
109. *Id.* at 349; *id.* at 429 (Kavanaugh, J., dissenting) ("[F]ive Members of the Court reject the *Whole Woman's Health* cost-benefit standard."); *see* Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After* Whole Woman's Health, 126 YALE L.J.F. 149 (2016); Linda Greenhouse & Reva B. Siegel, Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428 (2016).
110. *See June Med. Servs.*, 591 U.S. at 429 (Kavanaugh, J., dissenting).
111. *See id.* at 425 (Gorsuch, J., dissenting).
112. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 300 (2022).

validity.'"[113] As a result, a law "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."[114]

The Court began its rational basis review by considering the interests that had been raised in other abortion cases, such as *Roe* and *Gonzales*. These interests included:

> [R]espect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.[115]

The Court then addressed the Mississippi Gestational Age Act, the challenged state law that prohibited abortions after 15 weeks, and highlighted two interests proffered by the state to justify the law. First, the legislature had identified its "interest in 'protecting the life of the unborn.'"[116] Second, the legislature had "found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure 'for nontherapeutic or elective reasons [to be] a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession.'"[117] According to the Court, these interests were sufficient to provide a rational basis for the Mississippi statute.[118]

An analysis of the health costs imposed by abortion prohibitions is conspicuously absent in *Dobbs*. At no time did the Court acknowledge the corresponding costs to pregnant people—the health costs of pregnancy, the potential risks of childbirth, the harm posed by forcing someone to carry an unwanted pregnancy, and countless other physical and mental

113. *Id.* at 301 (citing Heller v. Doe, 509 U.S. 312, 319 (1993)).
114. *Id.*
115. *Id.* (citations omitted) (citing Roe v. Wade, 410 U.S. 113, 150 (1973) and Gonzales v. Carhart, 550 U.S. 124, 157–58 (2007)).
116. *Id.* (citing the legislative findings in the Mississippi Gestational Age Act).
117. *Id.* Despite the legislative findings, there is no meaningful evidence that abortions are dangerous to the maternal patient. *See* Press Release, Am. Med. Ass'n, Leading Medical Groups File Amicus Brief in Dobbs v. Jackson (Sept. 21, 2021), https://www.ama-assn.org/press-center/press-releases/leading-medical-groups-file-amicus-brief-dobbs-v-jackson [https://perma.cc/B46D-VY6M] ("[The Mississippi abortion] ban is not grounded on medical evidence . . . .").
118. *Dobbs*, 597 U.S. at 301.

consequences.[119] Instead, the Court focused solely on the purported benefits of restricting reproductive care identified by the Mississippi legislature. Because Mississippi failed to explore the corresponding costs to pregnant people, the Supreme Court ignored them.[120]

Since *Dobbs* was decided in 2022, it has had a profound impact on pregnant people. Individuals living in states that restrict abortion have been forced to confront a legal system that no longer protects their interests or respects their autonomy.[121] Some individuals have been forced to continue their pregnancies even though this would cause significant health risks and could affect their long-term fertility.[122] Other individuals have been forced to travel hundreds of miles to access reproductive care.[123] In some states, health care centers have closed, and doctors have left.[124] As access to medical care shrinks, states upholding reproductive rights have been overwhelmed with patients who are seeking vital health care.[125] Regardless of gender or geography, *Dobbs* has affected everyone.

119. *But see id.* at 396–98 (Breyer, Sotomayor & Kagan, JJ., dissenting) (highlighting health costs to pregnant people).

120. While the *Dobbs* opinion referenced the Court's rejection of cost-benefit analysis conveyed in *June Medical Services*, it did so only in the context of the *Casey* undue burden standard. *Id.* at 283–84.

121. *See* Benjamin Thornburg, Alene Kennedy-Hendricks, Joanne D. Rosen & Matthew D. Eisenberg, *Anxiety and Depression Symptoms After the* Dobbs *Abortion Decision*, 331 JAMA 294 (2024) (describing the adverse health consequences to residents living in states with abortion restrictions).

122. *E.g.*, Carter Sherman, *Kate Cox Case Reveals Toll of US Abortion Bans on Women in Medical Emergencies*, THE GUARDIAN (Dec. 16, 2023, 5:00 AM), https://www.theguardian.com/world/2023/dec/16/abortion-ban-lawsuits-pregnancy-complication-emergency-kate-cox [https://perma.cc/4NVP-RCV7].

123. *E.g.*, Zolan Kanno-Youngs & Edyra Espriella, *A New Border Crossing: Americans Turn to Mexico for Abortions*, N.Y. TIMES (Sept. 28, 2023), https://www.nytimes.com/2023/09/25/world/americas/mexico-abortion-women-border.html [https://perma.cc/N5W5-M7ND].

124. Sheryl Gay Stolberg, *As Abortion Laws Drive Obstetricians From Red States, Maternity Care Suffers*, N.Y. TIMES (Sept. 7, 2023), https://www.nytimes.com/2023/09/06/us/politics/abortion-obstetricians-maternity-care.html [https://perma.cc/EC23-QMNA]. In addition, many states are facing staff shortages in reproductive care. Rachana Pradhan & Julie Rovner, *Medical Residents Are Increasingly Avoiding States With Abortion Restrictions*, MISS. TODAY (May 9, 2024), https://mississippitoday.org/2024/05/09/medical-residents-are-increasingly-avoiding-states-with-abortion-restrictions [https://perma.cc/FC4N-FPD4]; Kyle Pfannenstiel, *Idaho Is Losing OB-GYNs After Strict Abortion Ban. But Health Exceptions Unlikely This Year*, IDAHO CAP. SUN (Apr. 5, 2024, 4:30 AM), https://idahocapitalsun.com/2024/04/05/idaho-is-losing-ob-gyns-after-strict-abortion-ban-but-health-exceptions-unlikely-this-year [https://perma.cc/XVS9-LJAY]; Slevin, *supra* note 90.

125. Andrew J. Campa, *California May Become a Destination for Abortions for Arizonans*, L.A. TIMES (Apr. 14, 2024, 6:30 AM), https://www.latimes.com/california/newsletter/2024-04-

### C. Considering Costs After *Dobbs*

Because rational basis review is now the standard that courts use to assess restrictions on reproductive care, cost analysis and verification should be an essential feature of this review.[126] Cost analysis and verification assess both the purported benefits *and* costs of government action. A rational basis review that considers the health costs imposed on pregnant people entails two steps.

First, state legislatures should be required to consider the health benefits and the costs of abortion restrictions on pregnant people, including the pain and suffering threshold that triggers medical exceptions. To date, state legislatures that are restricting abortion have focused, almost exclusively, on the purported benefits of protecting a fetus, and they routinely discount or ignore the health costs to pregnant people in their legislative findings.[127] Perhaps they find these costs irrelevant. Perhaps they believe that protecting the potential for human life outweighs the incredible pain and suffering that individuals may face during their pregnancy.[128] Regardless, legislatures should be required to articulate their cost-benefit analysis and explain their reasoning. Since legislatures routinely incorporate legislative findings into statutes, this requirement would be neither onerous nor unusual.[129]

To be clear, the costs that should be considered are not the financial costs that are imposed on pregnant people who are forced to bear a child against their will, although these costs are significant.[130] Rather, it is the health costs to pregnant

14/california-may-become-destination-for-abortions-for-arizonans-essential-california [https://perma.cc/4QBG-FRJC].

126. Cost analysis and verification are informed by the basic principles of cost-benefit analysis. *See generally* MICHAEL A. LIVERMORE & RICHARD L. REVESZ, REVIVING RATIONALITY: SAVING COST-BENEFIT ANALYSIS FOR THE SAKE OF THE ENVIRONMENT AND OUR HEALTH (2020); CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION (2018).

127. In *Dobbs*, for example, the Mississippi Gestational Age Act included no legislative findings addressing the potential costs to pregnant people of either restricting abortion altogether or imposing such a high standard to merit an exception. MISS. CODE ANN. § 41-41-191(2) (West 2024).

128. The health costs to pregnant people cannot be understated. *See, e.g.*, Suter, *supra* note 95, at 1495 (describing the impact of abortion restrictions on maternal health); Linda Brubaker & Kirsten Bibbins-Domingo, *Health Care Access and Reproductive Rights*, 328 JAMA 1707 (2022) (addressing the health risks of abortion restrictions).

129. *See* Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 670–71 (2019); Daniel A. Crane, *Enacted Legislative Findings and the Deference Problem*, 102 GEO. L.J. 637, 666–69 (2014); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 91–117 (2001).

130. Cost-benefit analysis of abortion generally focuses on its economic consequences. *See, e.g.*, Julianne Nelson, *Persuasion and Economic Efficiency: The Cost-Benefit Analysis of Banning*

people that should be considered and, specifically, the costs imposed on their physical and mental health when the right to abortion is curtailed.[131] Moreover, cost analysis should not just apply to the prohibition of abortion; it should also apply to the medical exceptions that limit the ability of pregnant people to seek an abortion.[132] Forcing pregnant people to suffer pain equivalent to torture as a condition for receiving reproductive care merits an explanation.[133]

Second, courts should be required to verify that state legislatures considered both the health benefits and the costs of abortion restrictions on pregnant people. Courts need not second guess these calculations or replace legislative preferences with judicial preferences. Rational basis review has always afforded significant deference to the legislative process.[134] However, courts should confirm that legislatures are engaged in this analysis.[135] The absence of cost verification in rational basis review undermines the legitimacy of even this most deferential form of judicial scrutiny.[136]

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*Abortion*, 9 ECON. & PHIL. 229 (1993); *see also* INST. FOR WOMEN'S POL'Y RSCH., UPDATED ANALYSIS OF THE COST OF ABORTION RESTRICTIONS TO STATES (2024); Victoria Guida, *Yellen: Banning Abortion Would Be "Very Damaging" to U.S. Economy*, POLITICO (May 10, 2022, 11:07 AM), https://www.politico.com/news/2022/05/10/yellen-banning-abortion-damaging-to-economy-00031339 [https://perma.cc/SS8L-6679].

131. Significantly, abortion exceptions, such as those recognized by Texas, only address physical suffering. They disregard the profound mental suffering that may arise when reproductive care is denied to pregnant people. *See* Caron, *supra* note 25; Lucy Ogbu-Nwobodo et al., *Mental Health Implications of Abortion Restrictions for Historically Marginalized Populations*, 387 NEW ENG. J. MED. 1613 (2022).

132. Stenberg v. Carhart, 530 U.S. 914, 931 (2000) ("[Our cases] make clear that a risk to . . . women's health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely.").

133. Julie C. Suk, *A World Without* Roe*: The Constitutional Future of Unwanted Pregnancy*, 64 WM. & MARY L. REV. 443, 465 (2022) ("Because the majority does not discuss it, it remains an open question as to how rational basis review would resolve a conflict between protecting prenatal life and protecting maternal health."); Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 41 (2022) ("Reasonable people have questions.").

134. In *Gonzales*, the Court acknowledged that it reviews "congressional factfinding under a deferential standard." Gonzales v. Carhart, 550 U.S. 124, 165 (2007). It noted, however, that "[t]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake." *Id.* (citing Crowell v. Benson, 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.")).

135. Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 410–16 (2016) (arguing that courts should engage in a more thoughtful and probing form of rational basis review).

136. *See generally* Joseph S. Diedrich, *Separation, Supremacy, and the Unconstitutional Rational Basis Test*, 66 VILL. L. REV. 249 (2021) (arguing that courts violate the separation of powers and the Supremacy Clause when they engage in rational basis review without any meaningful legal

As the Supreme Court has repeatedly emphasized, courts engaging in rational basis review must convey deference to the legislative process.[137] However, requiring state legislatures to confirm that they considered both the benefits and the costs of abortion restrictions on pregnant people's health does not second guess the legislative process or legislative findings. Rather, it ensures that legislatures have considered the consequences of the legislation they are adopting, such as the health consequences to individuals who are forced to bear a child against their will. And, it provides courts with information that is essential for meaningful judicial review.[138] Indeed, courts routinely engage in such review of government action.[139] By promoting meaningful legislative deliberation and transparency, this requirement is consistent with the most basic principles of democratic governance.[140]

Finally, there may be rare occasions when courts should not defer to the legislative process or any corresponding legislative findings. In exceptional cases, the Supreme Court has recognized that rational basis review "may appropriately take into account" the costs of government action.[141] For example, the Court has indicated that legislation can "hardly be considered rational" if it offers slight benefits but includes profound costs.[142] At some point, therefore, a court must be prepared to strike down legislation because the costs are extraordinary and

analysis); Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898 (2005) (arguing that rational basis review generally fails to engage in any meaningful legal analysis); Jeffrey D. Jackson, *Putting Rationality Back Into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491 (2011).

137. *See, e.g.*, Heller v. Doe by Doe, 509 U.S. 312, 319 (1993); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 320 (1976) (Marshall, J., dissenting).

138. Shobe, *supra* note 129, at 675 ("The contention here is that all of the text of a statute, including the enacted findings and purposes, must be read together as part of the whole legislative enactment to come up with an interpretation that the entire text can bear. This is more likely to generate an interpretation in line with Congress's intent than an interpretation based on an isolationist mode of interpretation.").

139. For example, claims under the Administrative Procedures Act require a similar two-step review process. First, an agency must "'disclose the basis' of its action." Dep't of Com. v. New York, 588 U.S. 752, 780 (2019) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167–69 (1962)). Second, a court must consider the agency's stated basis of its action. When a court undertakes its review, it "is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Id.*

140. *See, e.g.*, Andre Bächtiger, John S. Dryzek, Jane Mansbridge & Mark Warren, *Deliberative Democracy: An Introduction*, *in* THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY 1, 2 (Andre Bächtiger, John S. Dryzek, Jane Mansbridge & Mark Warren, eds., 2018) (arguing that deliberative democracy involves weighing and reflecting on preferences, values, and interests).

141. Plyler v. Doe, 457 U.S. 202, 224 (1982).

142. *See id.*

disproportionate to any conceivable benefit.[143] In the context of abortion, the costs to pregnant people are extraordinary and disproportionate. As the *Dobbs* dissent noted, "short of death, how much illness or injury can the State require [a woman] to accept?"[144]

A related problem arising in cases of judicial deference to the legislative process involves misinformation.[145] If legislation is based on information that is factually incorrect, is it rational?[146] Misinformation has been a troubling feature in abortion legislation, something the Court has previously recognized.[147] In *Gonzales*, for example, the Court acknowledged that some recitations in the Partial-Birth Abortion Act were "factually incorrect."[148] Seventeen years later, misinformation still plagues abortion policy debates. Critics often raise arguments that are simply inaccurate, from asserting that abortions are riskier than childbirth to arguing that abortions harm maternal mental health.[149] If courts are unwilling

143. On several occasions, the Supreme Court has struck down federal, state, and local laws under rational basis review. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (finding amendments to the Colorado state constitution to be unconstitutional because they were motivated by animus on the basis of sexual orientation); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (finding denial of special use permit by city to be unconstitutional); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (finding amendments to the Food Stamp Act to be unconstitutional). These cases share a common thread—the government actors appeared motivated by animus. *See* Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review*, 90 N.Y.U. L. REV. 2070 (2015).

144. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 393 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting); *see also* Matthew Coffin, Note, *Abortion at the Margins*, 76 STAN. L. REV. 269 (2024) (arguing that abortion bans without exceptions for severe fetal abnormality fail rational basis review).

145. While the potential for errors in law has always existed, this problem has grown in the modern era. Ari Ezra Waldman, *Manufacturing Uncertainty in Constitutional Law*, 91 FORDHAM L. REV. 2249, 2253–54, 2256–58 (2023); *see generally* Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175 (2018).

146. *See, e.g.*, Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 AM. J.L. & MED. 85 (2015); Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111 (2008).

147. *See* Gonzales v. Carhart, 550 U.S. 124, 165 (2007).

148. *Id.*

149. *See, e.g.*, Jenna Sherman, *How Abortion Misinformation and Disinformation Spread Online*, SCI. AM. (June 24, 2022), https://www.scientificamerican.com/article/how-abortion-misinformation-and-disinformation-spread-online [https://perma.cc/Q7CQ-FWWM]; Rachel Lerman, *People Searching for Abortion Online Must Wade Through Misinformation*, WASH. POST (July 4, 2022, 6:00 AM), https://www.washingtonpost.com/technology/2022/07/04/abortion-misinformation-herbal-remedies [https://perma.cc/M4SP-E2KR]; Sam Rowlands, *Misinformation on Abortion*, 16 EUR. J. CONTRACEPTION & REPROD. HEALTH CARE 233 (2011). The growth of misinformation about abortion increased after the *Dobbs* decision. Claire Suddath, *Trump, Project 2025, and Spreading Abortion Misinformation*, BLOOMBERG (July 11, 2024, 1:00 PM), https://

to rule against government action when it is based on misinformation, then rational basis review is neither rational nor a review.[150]

In *Dobbs*, the Supreme Court authorized the people's elected representatives to regulate or prohibit abortion. This outcome presumes that elected representatives will engage in a thoughtful, robust, and deliberative process that honestly weighs the benefits and burdens of proposed legislation. We may not always agree with the outcome, but we acknowledge that our voices were heard and our concerns were studied. In those states that fail to consider the profound harms that abortion restrictions impose on pregnant people, that fail to acknowledge the pain and suffering that pregnant people are forced to endure to be eligible for life-saving medical care, and that simply disregard the chaos, cruelty, and violence that ensues, the people's elected representatives have failed their constituents.

## CONCLUSION

Opponents of abortion have often pointed to the medical exceptions in state laws as a compromise and as something that reflects the reasonableness of their position.[151] Abortion should be prohibited, they argue, unless the pregnancy

www.bloomberg.com/news/newsletters/2024-07-11/project-2025-trump-and-false-claims-about-abortion [https://perma.cc/L222-5M2D]; Sherry L. Pagoto, Lindsay Palmer & Nate Horwitz-Willis, *The Next Infodemic: Abortion Misinformation*, 25 J. MED. INTERNET RSCH., 2023, at E42582.

150. *See* Joseph Landau, *Broken Records: Reconceptualizing Rational Basis Review to Address "Alternative Facts" in the Legislative Process*, 73 VAND. L. REV. 425, 430–31 (2020) (identifying the problem of "alternative facts" and suggesting that rational basis review should examine whether legislation was predicated on a distorted factual record); Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1320–21 (2018) (describing the jurisprudence surrounding rational basis review as messy and inconsistent); James M. McGoldrick, Jr., *The Rational Basis Test and Why It Is So Irrational: An Eighty-Year Retrospective*, 55 SAN DIEGO L. REV. 751, 752 (2018) (describing the shortcomings of the rational basis test). *See also* Katie R. Eyer, *Protected Class Rational Basis Review*, 95 N.C. L. REV. 975 (2017); Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1629 (2016); Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281 (2015).

151. *See, e.g.*, Laura Romero, *Virginia Elections Could Allow "Reasonable" 15-Week Abortion Ban With Exceptions, Gov. Youngkin Argues*, ABC NEWS (Nov. 5, 2023, 9:35 AM), https://abcnews.go.com/Politics/virginia-elections-reasonable-15-week-abortion-ban-exceptions/story?id=104635775 [https://perma.cc/P7R7-48UA] (Virginia governor describing a fifteen-week abortion ban with limited exceptions as a compromise); Ed Kilgore, *Is a 12-Week Abortion Ban a "Reasonable Compromise"?* N.Y. INTELLIGENCER (May 19, 2023), https://nymag.com/intelligencer/2023/05/is-a-12-week-abortion-ban-a-reasonable-compromise.html [https://perma.cc/BX42-UE6Y] (referring to North Carolina's new

threatens the life or health of a woman or other pregnant person.[152] And yet, state legislatures have never indicated that they considered the physical and mental health costs to pregnant people when restricting abortion, and they have consistently failed to legislate workable, humane guidelines regarding when medical exemptions must be granted. Nor have courts required them to do so.[153] But they should.

Forcing pregnant people to suffer pain that is equivalent to torture as a condition for receiving reproductive care is an extraordinary requirement. This demand should generate the same concerns that led the Office of Legal Counsel to renounce the standard as a lawful and appropriate benchmark for the treatment of human beings.[154] Accordingly, legislatures should be obligated to consider the costs and benefits of proposed abortion legislation, and courts should be required to verify that they have done so. Such an approach is consistent with deliberative democracy and the purpose of judicial review. While this will not heal the scars that have already been inflicted on pregnant people, it may lessen the pain and suffering imposed on future generations.

twelve-week abortion ban with exceptions for rape, incest, and fetal life-limiting anomalies and whether it might make the state a "pioneer for a compromise approach to the abortion issue.").

152. Eleanor Klibanoff, *Texas Supreme Court Considers Abortion Challenge*, TEX. TRIB. (Nov. 28, 2023, 3:00 PM), https://www.texastribune.org/2023/11/28/texas-supreme-court-abortion [https://perma.cc/5TKT-54ZM]; Michael Scherer & Rachel Roubein, *More Republicans Push for Abortion Bans Without Rape, Incest Exceptions*, WASH. POST (July 16, 2022), https://www.washingtonpost.com/politics/2022/07/15/abortion-exceptions-republicans [https://perma.cc/ZL5A-VJNE]; PEW RSCH. CTR., AMERICA'S ABORTION QUANDARY 12 (2022) (majority of adults in United States believe abortion should be legal if a woman's life or health is at risk).

153. *See* Kimberlee Kruesi & Geoff Mulvihill, *Some State Abortion Bans Stir Confusion, and It's Uncertain if Lawmakers Will Clarify Them*, L.A. TIMES (Dec. 21, 2023), https://www.latimes.com/world-nation/story/2023-12-21/some-state-abortion-bans-stir-confusion-and-its-uncertain-if-lawmakers-will-clarify-them [https://perma.cc/7CWN-2VW2]; 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 [https://perma.cc/A3HC-73H2]; Mary Ziegler, *Why Exceptions for the Life of the Mother Have Disappeared*, THE ATLANTIC (July 25, 2022), https://www.theatlantic.com/ideas/archive/2022/07/abortion-ban-life-of-the-mother-exception/670582 [https://perma.cc/BYN5-V9RD].

154. The failure to respect human rights during the war on terror serves as a powerful lesson on the need to respect human rights even in the most challenging times. *See generally* TOM PARKER, AVOIDING THE TERRORIST TRAP: WHY RESPECT FOR HUMAN RIGHTS IS THE KEY TO DEFEATING TERRORISM (2019) (arguing that respect for human rights is an essential strategy for combatting terrorism); RICHARD L. ABEL, LAW'S WARS: THE FATE OF THE RULE OF LAW IN THE US "WAR ON TERROR" (2018) (addressing efforts to combat human rights abuses in the war on terror).