CHRONIC CONDITIONS AND REPRODUCTION IN A POST-*DOBBS* WORLD

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Within twenty-four hours of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,[1] which gutted almost fifty years of precedent by overturning *Roe v. Wade*,[2] Myisha Malone-King received a call from her insurance company.[3] The company informed her that a medication she was taking, methotrexate, would no longer be available.[4] Malone-King, a mother of four children in her early forties and a breast cancer and COVID-19 survivor, also suffers from diverticulitis, chronic obstructive pulmonary disease (COPD), and Crohn's disease.[5] Crohn's disease is a chronic inflammatory bowel condition that is painful and debilitating, and it can even have life-threatening complications.[6] For years, Malone-King relied on methotrexate, a medication that has been used for years to treat a variety of inflammatory-related diseases, including Crohn's, rheumatoid arthritis, and psoriasis.[7]

What could Malone-King's Crohn's medication have to do with the Supreme Court's decision to overturn the constitutional right to abortion? In addition to treating conditions like Crohn's disease, methotrexate can be used off-label in high doses to treat miscarriages or ectopic pregnancies, thereby

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1. 597 U.S. 215 (2022).
2. 410 U.S. 113 (1973), *overruled* by *Dobbs*, 597 U.S. 215.
3. Jen Christensen, *Women with Chronic Conditions Struggle to Find Medications After Abortion Laws Limit Access*, CNN (July 22, 2022, 7:11 AM), https://www.cnn.com/2022/07/22/health/abortion-law-medications-methotrexate/index.html; Ellen Matloff, *One Year After Dobbs Decision, Women Blocked from Meds for Conditions Unrelated to Abortion*, FORBES (June 23, 2023, 12:08 PM), https://www.forbes.com/sites/ellenmatloff/2023/06/23/one-year-after-dobbs-decision-women-blocked-from-meds-for-conditions-unrelated-to-abortion/?sh=6e7548763277.
4. Christensen, *supra* note 3; Matloff, *supra* note 3.
5. Christensen, *supra* note 3; Matloff, *supra* note 3; *see also* Myisha Malone-King, *No One Should Go Through a Major Diagnosis Alone*, PATIENTS RISING STORIES, https://patientsrisingstories.org/story/no-one-should-go-through-major-diagnosis-alone/ (last visited Mar. 28, 2024).
6. *Crohn's Disease*, MAYO CLINIC (Aug. 6, 2022), https://www.mayoclinic.org/diseases-conditions/crohns-disease/symptoms-causes/syc-20353304.
7. Christensen, *supra* note 3.

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linking it to other abortion-inducing medications.[8] Methotrexate is not, however, part of the medication abortion regimen approved by the U.S. Food and Drug Administration (FDA), which consists of mifepristone and misoprostol.[9] Nevertheless, *Dobbs* and ensuing changes in state abortion laws have "spooked insurance providers, pharmacies, and medical offices into restricting the use of methotrexate, even in states where abortion is legal."[10] A year after the *Dobbs* decision, Malone-King remained unable to access methotrexate.[11] Her only treatment options were medications she had already tried and found ineffective.[12] Without access to methotrexate, she continues to suffer through "flare-ups."[13]

Tragically, Malone-King is not alone. The Supreme Court's decision to overturn *Roe*, thereby leaving decisions about abortion rights and access entirely to the states, has implications beyond banning or restricting access to abortion. Specifically, this Article focuses on individuals with chronic conditions, an often-overlooked subset of the broader community of persons with disabilities. Individuals with chronic conditions represent a population that faces unique harms and burdens in a post-*Dobbs* world. Pregnancy-capable persons[14] with chronic conditions are collateral damage in the abortion culture wars, with those on both sides of the battle tending to forget or disregard this population's unique healthcare needs.

This Article seeks to close this gap in the scholarship and broader discussion about abortion by making two distinct, yet overlapping, assertions. First, disability rights advocates must ensure that individuals with chronic conditions are recognized in the fight for reproductive justice. And second, in an era where access to abortion remains under attack, advocates should fight for incremental, piecemeal improvements, such as by urging lawmakers to include explicit policies that exempt individuals with chronic conditions from laws that limit access to reproductive health care, including abortion.

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8. *See* Elisabeth Mahase, *US Anti-Abortion Laws May Restrict Access to Vital Drug for Autoimmune Diseases, Patient Groups Warn*, THE BMJ, July 6, 2022, at 1, 1.

9. *See* MIFEPREX (mifepristone) Tablets, 200mg (Nov. 12, 2004), https://www.accessdata.fda.gov/drugsatfda_docs/label/2004/020687s010-lbl.pdf (package insert).

10. Christensen, *supra* note 3.

11. *See id.*

12. Matloff, *supra* note 3.

13. *Id.*

14. Abortion is often framed as a "women's" issue, but transgender, nonbinary, and gender-nonconforming people may also become pregnant and need abortions. Whenever possible, this Article uses gender-neutral language. The term "woman" or "women" may be used, particularly where the sources use that terminology.

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The current legal, political, and judicial environment in the United States makes a complete return to a pre-*Dobbs* landscape unlikely in the short-term. As a result, advocates must make inroads piece by piece, taking lessons from the anti-abortion movement, which spent years dismantling *Roe* and reproductive health freedoms one piece at a time.

This Article proceeds in three parts. Part I defines and describes the term "chronic condition." Part II unpacks the unique burdens of overturning *Roe* for pregnancy-capable persons with chronic conditions. Finally, Part III argues that disability justice advocates (including people with chronic conditions) alongside other reproductive justice advocates, should consider an incremental, piece-by-piece approach to reinvigorating abortion rights and access to comprehensive reproductive health care. The community of persons with disabilities can lead the charge by first advocating for broader and clearer life and health exceptions to abortion bans, along with clear legal protections for access to essential medications and artificial reproductive technology (ART).

I. Chronic Conditions: Background

Existing definitions of "chronic conditions," sometimes referred to as chronic diseases or chronic illnesses, vary depending on the source. The Centers for Disease Control and Prevention (CDC) and the National Institutes of Health (NIH) define chronic conditions as "conditions that last a year or more and require ongoing medical attention and/or limit activities of daily living."[15] The World Health Organization (WHO) similarly defines chronic conditions as "health problems that require ongoing management over a period of years or decades."[16] These broad definitions capture relatively common conditions such as diabetes, cancer, heart disease, obesity,

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15. Sarah M. Temkin et al., *Chronic Conditions in Women: The Development of a National Institutes of Health Framework*, BMC WOMEN'S HEALTH, article no. 162, Apr. 6, 2023, at 2, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10077654/pdf/12905_2023_Article_2319.pdf (quoting Gregg Warshaw, *Introduction: Advances and Challenges in Care of Older People with Chronic Illness*, J. AM. SOC'Y ON AGING, Fall 2006, at 5, 5); *About Chronic Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/chronicdisease/about/ (last updated July 21, 2022).

16. Susan M. Smith et al., *Interventions for Improving Outcomes in Patients with Multimorbidity in Primary Care and Community Settings*, COCHRANE DATABASE OF SYSTEMATIC REVS., article no. CD006560, Mar. 15, 2016, at 1, 2, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6703144/pdf/CD006560.pdf.

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epilepsy, and endometriosis,[17] as well as rare diseases[18] like cystic fibrosis,[19] sickle cell disease,[20] myasthenia gravis,[21] and a number of genetic disorders. The Centers for Medicare and Medicaid Services (CMS) has identified twenty-one chronic conditions for which its beneficiaries receive services or treatment.[22]

According to the CDC, six in ten adults in the United States suffer from at least one chronic condition, and four in ten adults suffer from two or more chronic conditions ("multi-morbidity").[23] Evidence suggests that women are more likely to experience multi-morbidity.[24] In fact, increasing rates of "chronic debilitating conditions among women" was one of three key public health concerns cited in the Fiscal Year 2021 U.S. Senate and House of Representatives appropriations review, which also requested a review of current NIH portfolios and a gathering of experts on women's health.[25]

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17. *See About Chronic Diseases*, *supra* note 15 (listing heart disease and stroke, cancer, and diabetes as "major chronic diseases"); *Endometriosis*, U.S. DEP'T OF HEALTH & HUM. SERVS.: OFF. ON WOMEN'S HEALTH, https://www.womenshealth.gov/a-z-topics/endometriosis (last updated Feb. 22, 2021) (indicating that researchers estimate more than 6.5 million women in the United States have endometriosis).

18. A rare disease is generally defined as a disease or condition that impacts fewer than 200,000 people in the United States. *About GARD*, NAT'L INST. HEALTH: NAT'L CTR. FOR ADVANCING TRANSLATIONAL SCIS., https://rarediseases.info.nih.gov/about (last visited Sept. 28, 2023).

19. Data suggests that there are around 40,000 people with cystic fibrosis (CF) in the United States. Elizabeth A. Cromwell et al., *Cystic Fibrosis Prevalence in the United States and Participation in the Cystic Fibrosis Foundation Patient Registry in 2020*, 22 J. CYSTIC FIBROSIS 436, 441 (2023).

20. Sickle cell disease affects approximately 100,000 Americans and is most common among Black Americans. *Data & Statistics on Sickle Cell Disease*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/sickle-cell/data/?CDC_AAref_Val (last updated July 6, 2023).

21. Myasthenia gravis affects between 36,000 and 60,000 people in the United States. It is a progressive disorder of neuromuscular transmission causing progressive weakness. *See* James F. Howard, *Clinical Overview of MG*, MYASTHENIA GRAVIS FOUND. OF AM. (June 2015), https://myasthenia.org/Professionals/Clinical-Overview-of-MG.

22. Temkin et al., *supra* note 15, at 2; *Specific Chronic Conditions,* CTRS. FOR MEDICARE & MEDICAID SERVS., https://data.cms.gov/medicare-chronic-conditions/specific-chronic-conditions (last updated Sept. 6, 2023) (providing a table with the twenty-one conditions).

23. Temkin et al., *supra* note 15; *About Chronic Diseases*, *supra* note 15.

24. Temkin et al., *supra* note 15.

25. *Id.*

The United States and Canada represent the two high-income countries where women of reproductive age are the population most likely to suffer from multiple chronic conditions.[26] This overlaps with the United States' abysmal record on access to reproductive and maternal health care. Troublingly, the burdens are not shared equally across the population—women of color experience higher rates and worse health outcomes for many chronic conditions.[27] Relatedly, the maternal mortality rate for Black American women is "exceptionally high"[28]—more than double the average rate and the rate for non-Hispanic White women in 2022.[29] This, of course, represents a troubling trend that stems from years of systemic racism: Black Americans fare worse than White Americans on a range of health, economic, political, and other indicators.[30]

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26. Munira Z. Gunja et al., *Health and Health Care for Women of Reproductive Age: How the United States Compares with Other High-Income Countries*, COMMONWEALTH FUND (Apr. 5, 2022), https://www.commonwealthfund.org/publications/issue-briefs/2022/apr/health-and-health-care-women-reproductive-age.

27. *See generally* Layota Hill et al., *Key Data and Health Care by Race and Ethnicity*, KAISER FAMILY FOUND. (Mar. 15, 2023), https://www.kff.org/racial-equity-and-health-policy/report/key-data-on-health-and-health-care-by-race-and-ethnicity/ (analyzing how people of color fair across a broad range of measures of health outcomes); *Why Culturally Competent Care for Women of Color Matters* at 2:00, COMMONWEALTH FUND: THE DOSE (June 30, 2023), https://www.commonwealthfund.org/publications/podcast/2023/jun/why-culturally-competent-care-women-color-matters (discussing potential solutions for women of color in the health care field to these outcomes by connecting women of color with culturally sensitive doctors).

28. Munira Z. Gunja et al., *The U.S. Maternal Mortality Crisis Continues to Worsen: An International Comparison*, COMMONWEALTH FUND (Dec. 1, 2022), https://www.commonwealthfund.org/blog/2022/us-maternal-mortality-crisis-continues-worsen-international-comparison; *see also* David C. Radley et al., *2023 Scorecard on State Health System Performance*, COMMONWEALTH FUND (June 22, 2022), https://www.commonwealthfund.org/publications/scorecard/2023/jun/2023-scorecard-state-health-system-performance.

29. Donna L. Hoyer, *Maternal Mortality Rates in the United States, 2022*, NAT'L CTR. FOR HEALTH STATS., HEALTH E-STATS (May 2024), https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2022/maternal-mortality-rates-2022.pdf.

30. *See generally* NAT'L URBAN LEAGUE, STATE OF BLACK AMERICA: DEMOCRACY IN PERIL: CONFRONTING THE THREAT WITHIN 3 (2023), https://soba.iamempowered.com/sites/soba.iamempowered.com/files/NUL-SOBA-Executive-Summary-2023-web.pdf (summary of the full report) (exploring "the inequities across America's economics, employment, education, health, housing, criminal justice, and civic participation systems"); Michelle Odlum et al., *Trends in Poor Health Indicators Among Black and Hispanic Middle-Aged and Older Adults in the United States, 1998–2018*, JAMA NETWORK OPEN, article no. e2025134, Nov. 11, 2022, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7658737/; Nicholas Stephanopoulos, *The False Promise of Black Political Representation*, THE ATLANTIC (June 11, 2015), https://www.theatlantic.com/politics/archive/2015/06/black-political-representation-

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This Article considers the term "disability" to include chronic conditions. For inclusivity, this Article uses the term "chronic condition" rather than "chronic illness" or "chronic disease" to recognize a long and often problematic relationship between disability and illness. As Professor Susan Wendell explains:

> Many people are disabled by chronic and/or life-threatening illnesses, and many people with disabilities not caused by illness have chronic health problems as consequences of their disabilities; but modern movements for the rights of people with disabilities have fought the identification of disability with illness, and for good reasons. This identification contributes to the medicalization of disability, in which disability is regarded as an individual misfortune, and people with disabilities are assumed to suffer primarily from physical and/or mental abnormalities that medicine can and should treat, cure, or at least prevent.[31]

This Article recognizes, however, that every individual's experience is unique. Some may prefer a medicalized model of disability, whereas others do not view themselves as "sick, diseased, ill," or in need of a cure.[32] By including chronic conditions under the umbrella of "disabilities," this Article does not mean to diminish the agency of each individual to determine how they prefer to identify and be viewed by society. Rather, it calls for a clearer understanding of how restrictions on reproductive health care impact individuals with chronic conditions—no matter how they label themselves—and how disability law and disability justice advocates may help inform pathways forward.

II. Chronic Conditions, Reproductive Health, and Pregnancy

Chronic conditions have direct and indirect effects on pregnancy and reproductive health. Thus, it is undeniable that laws and policies regulating

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power/395594/ (reporting that even though Black Americans have made gains in participation and representation, they continue to fare worse than White Americans in converting their policy preferences into law); Philip Moss et al., *Employment and Earnings of African Americans Fifty Years After: Progress?* (Inst. for New Econ. Thinking, Working Paper No. 129, 2020), https://www.ineteconomics.org/uploads/papers/WP_129-Lazonick-et-al-final.pdf (discussing various disparities between Blacks and Whites in the United States),

31. Susan Wendell, *Unhealthy Disabled: Treating Chronic Illnesses as Disabilities*, HYPATIA, Nov. 2001, at 17, 17.

32. *Id.* at 18 (quoting ELI CLARE, EXILE AND PRIDE: DISABILITY, QUEERNESS AND LIBERATION 105-06 (1999)).

reproductive health care have consequences for the reproductive health of individuals with chronic conditions. This Part describes some of the potential consequences faced by people with chronic conditions as a result of recent attacks on reproductive health care. This discussion is not meant to be exhaustive, and it acknowledges that the impact of a chronic condition on a person's reproductive health is highly variable and individualized.

A. Access to Essential, Nonabortion Medications

In light of restrictions on both procedural and medical abortions, pregnancy-capable persons suffering from a range of chronic conditions are finding it difficult to access medications that are essential for their well-being or even their survival. These situations transpire because drugs used to treat many chronic conditions may also be used off-label to terminate a pregnancy or are otherwise associated with pregnancy complications or termination. In an era where anti-abortion advocates continue to work toward their ultimate goal—complete eradication of abortion throughout the United States—any drug with a potential effect on pregnancy remains in the crosshairs and subject to attack.

It is well-recognized and documented that anti-abortion laws can also affect access to contraception and other family planning services.[33] Now, however, states experience broader clinic closures and an expanding breadth of consequences into all areas of obstetrics/gynecology—including labor and

33. Diana Baptista, *U.S. Women Struggle to Find Contraception as Restrictions Mount*, CONTEXT (June 22, 2023), https://www.context.news/socioeconomic-inclusion/us-women-struggle-to-find-contraception-as-restrictions-mount; Monica Potts, *How Limiting Access to Abortion Limits Access to Birth Control*, FIVETHIRTYEIGHT (July 13, 2022, 6:00 AM), https://fivethirtyeight.com/features/how-limiting-access-to-abortion-limits-access-to-birth-control/.

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delivery care,[34] primary care,[35] gender-affirming care,[36] and screenings for cancer and other diseases.[37] The treatment and management of chronic conditions has not escaped the fallout. The access-limiting effects of *Dobbs* aggravate the woes of an American healthcare system already stretched thin by the COVID-19 pandemic, rising costs, and worsening staff and supply shortages.[38] Indeed, some believe that the American healthcare system is on

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34. In March 2023, Bonner General Health decided to discontinue providing obstetrical services, in part because of the state's "legal and political climate." Press Release, Bonner Gen. Health, Discontinuation of Labor and Delivery Services at Bonner General Hospital (Mar. 17, 2023), https://bonnergeneral.org/wp-content/uploads/2023/03/Bonner-General-Health-Press-Release-Closure-of-LD-3.17.2023.pdf. The number of "maternity care deserts" has increased in recent years. CHRISTINA BRIGANCE, NOWHERE TO GO: MATERNITY CARE DESERTS ACROSS THE U.S. 2 (2022), https://www.marchofdimes.org/sites/default/files/2022-10/2022_Maternity_Care_Report.pdf. A "maternity care desert" is defined "as any county without a hospital or birth center offering obstetric care and without any obstetric providers." *Id.* at 6.

35. *See, e.g.*, Nadine El-Bawab, *Doctors Face Tough Decision to Leave States with Abortion Bans*, ABC NEWS (June 23, 2023, 4:04 AM), https://abcnews.go.com/US/doctors-face-tough-decision-leave-states-abortion-bans/story?id=100167986 (noting doctors have struggled to provide the best possible care to patients since the enactment of abortion bans); Mary Tuma, *The Last Independent Reproductive Health Clinics in Texas Struggle to Survive*, TEX. MONTHLY (Oct. 19, 2023), https://www.texasmonthly.com/news-politics/independent-reproductive-health-clinics-in-texas-struggle-to-survive/ (highlighting how the closure of multiple abortion clinics in Texas, which also provided primary health care, has impacted patients and the struggle of surviving clinics "to stay afloat"). One former clinic manager notes that "the abortion clinics that are closing left and right did not just offer abortion but so many other essential health care services, largely for underserved communities." *Id.*

36. Juliana Kim, *How Gender-Affirming Care May Be Impacted When Clinics That Offer Abortions Close*, NPR (Aug. 14, 2022, 6:59 AM), https://www.npr.org/2022/08/14/1115875421/gender-affirming-care-abortion-clinics.

37. Anusha Ravi, *Limiting Abortion Access Contributes to Poor Maternal Outcomes*, CTR. FOR AM. PROGRESS (June 13, 2018), https://www.americanprogress.org/article/limiting-abortion-access-contributes-poor-maternal-health-outcomes/.

38. *See, e.g.*, Robert Glatter et al., *American Health Care Faces a Staffing Crisis and It's Affecting Care*, TIME (June 30, 2023, 8:43 AM), https://time.com/6291392/american-health-care-staffing-crisis/; *The Next Supply Chain Crisis Is Coming. Here Are 3 Things CEOs Can Do.*, ADVISORY BD. (Mar. 18, 2023), https://www.advisory.com/daily-briefing/2022/11/14/supply-chain ("The health care supply chain is experiencing 'tremendous' shortages."); Marquisha Johns, *In the Face of a National Drug Shortage, the US Must Bolster Its Supply Chain*, THE HILL (Aug. 27, 2023, 11:00 AM), https://thehill.com/opinion/healthcare/4169657-in-the-face-of-a-national-drug-shortage-the-us-must-bolster-its-supply-chains/ ("Shortages of critical drugs in the U.S. resulting from supply chain issues are occurring more frequently, and having devastating impacts on patient care and health.").

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the verge of collapse.[39]

Methotrexate, the drug used by Malone-King to successfully manage her symptoms, is commonly prescribed for a number of chronic conditions, including many types of cancer and inflammatory diseases.[40] According to the American College of Rheumatology, "Methotrexate remains the standard of care for a variety of autoimmune diseases. Therefore, methotrexate must remain accessible to people with rheumatic diseases, and legal safeguards must protect rheumatology professionals, pharmacists, and patients from potential legal penalties."[41]

For individuals who are and want to remain pregnant, methotrexate is contraindicated because it can cause pregnancy termination.[42] Methotrexate use is more common in women, who make up seven out of ten people with a methotrexate prescription.[43] Among women with a methotrexate prescription, the vast majority use it for conditions unrelated to pregnancy.[44] For many individuals, methotrexate is an essential medicine that provides the only respite from otherwise severe symptoms.[45] Becky Schwartz, who suffers from lupus, describes methotrexate as a "miracle drug" that was "really . . .

39. Robert Glatter et al., *The Coming Collapse of the U.S. Health Care System*, TIME (Jan. 10, 2023, 3:16 PM), https://time.com/6246045/collapse-us-health-care-system/.

40. *Methotrexate*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/drugs/20143-methotrexate (last visited Mar. 28, 2024); Brittni Frederiksen et al., *Abortion Bans May Limit Essential Medications for Women with Chronic Conditions* at tbl. 1, KAISER FAMILY FOUND. (KFF): WOMEN'S HEALTH POL'Y (Nov. 17, 2022), https://www.kff.org/womens-health-policy/issue-brief/abortion-bans-may-limit-essential-medications-for-women-with-chronic-conditions/ (listing several pregnancy and nonpregnancy related uses for methotrexate).

41. Katie Kindelan, *Mom Speaks Out After 14-Year-Old Daughter Was Denied Arthritis Medication Due to Abortion Law*, ABC NEWS (Oct. 6, 2022, 2:03 PM), https://abcnews.go.com/GMA/Wellness/mom-speaks-14-year-daughter-denied-arthritis-medication/story?id=91107896.

42. *See Highlights of Prescribing Information: Methotrexate*, FOOD & DRUG ADMIN. (Mar. 2022), https://www.accessdata.fda.gov/drugsatfda_docs/label/2022/214121s001lbl.pdf ("[M]ethotrexate can cause embryo-fetal toxicity, including fetal death when administered to a pregnant woman.").

43. Fredriksen et al., *supra* note 40, at fig.1.

44. *Id.* at fig.2 (showing that among women aged eighteen to forty-nine using methotrexate, ninety-two percent are not pregnant).

45. *Understanding Methotrexate*, ARTHRITIS FOUND., https://www.arthritis.org/drug-guide/medication-topics/understanding-methotrexate (last visited Mar. 28, 2024) ("Methotrexate is one of the mainstays of treatment for inflammatory forms of arthritis. It not only reduces pain and swelling, but it can actually slow joint damage and disease progression over time.").

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effective" in controlling her disease.[46] But like Malone-King, six days after the *Dobbs* decision, she was informed by her rheumatologist that she would not be able to refill her methotrexate prescription. The importance of this medication is illustrated by the fact that methotrexate is on the WHO's list of "essential medicines."[47]

Misoprostol is another drug that is proving more difficult to access for nonabortion purposes because of its use in medication abortion. Misoprostol, in combination with mifepristone, is approved by the FDA to terminate an intrauterine pregnancy through seventy days gestation.[48] Misoprostol is also frequently used for miscarriage management, induction of labor, cervical ripening before surgical procedures,[49] and the treatment of postpartum hemorrhage.[50] Additionally, it can be used to reduce the risk of nonsteroidal anti-inflammatory drug-induced gastric ulcers and, in combination with diclofenac, can help manage rheumatoid arthritis and osteoarthritis.[51]

Data suggest that women made up the majority (seventy-one percent) of individuals prescribed methotrexate in 2019, and approximately ninety-two percent of people with methotrexate prescriptions use it for conditions *unrelated to pregnancy*.[52] Women made up ninety-seven percent of misoprostol prescriptions in 2019, and sixty-one percent of reproductive age women who used misoprostol were not pregnant.[53]

Limiting access to these medications for nonabortion purposes can have life-altering, debilitating, and harmful results for individuals who rely on these drugs for disease management. Halting methotrexate, for example, can result in weeks or months of unmanaged symptoms, and for conditions like rheumatoid arthritis, stopping its use can even shorten an individual's lifespan.[54] Schwartz expressed feelings of dread about her impending medication change. Before starting methotrexate daily, tasks like walking

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46. Christensen, *supra* note 4.
47. WORLD HEALTH ORG., MODEL LIST OF ESSENTIAL MEDICINES 2023: WEB ANNEX A, at 30, 42, 59, 60 (23d list, 2023), https://iris.who.int/bitstream/handle/10665/371090/WHO-MHP-HPS-EML-2023.02-eng.pdf?sequence=1.
48. *MIFEPREX* (mifepristone) Tablets, 200mg, *supra* note 9.
49. For example, cervical ripening is used during procedures to insert intrauterine devices or to remove uterine polyps. Frederiksen et al., *supra* note 40.
50. *Id.*
51. *Id.*
52. *Id.* at fig.2.
53. *Id.* at figs.3, 4.
54. *See, e.g.*, Mary Chester M. Wasko et al., *Propensity-Adjusted Association of Methotrexate with Overall Survival in Rheumatoid Arthritis*, 65 ARTHRITIS & RHEUMATISM 334, 334 (2013).

and showering were difficult for her, and a lack of access to methotrexate "could make such a drastic and terrible difference in [her] life."[55] Dr. Mehret Birru Talabi, a rheumatologist and assistant professor of medicine at the University of Pittsburgh, calls it a "travesty," stating that "[j]ust the idea that your reproductive health status might undermine your care and your treatment, even if you're not pregnant—it's really disheartening."[56]

For Emma Thompson, a fourteen-year-old who has faced difficulty and suspicion obtaining her methotrexate prescription to treat her rheumatoid arthritis, the possibility of having to live without her medication is frightening.[57] Thompson has used methotrexate since she was a young child to control her rheumatoid arthritis and other autoimmune diseases.[58] According to Thompson, she was in and out of the hospital, unable to stay in school, and unable to take part in basic childhood activities like riding a bike until her doctor came up with the right combination of drugs—including methotrexate—to control her illness and pain.[59] Thompson's mother was scared that her daughter would go "backwards to where she used to be" without her current medication regimen.[60] Thompson realizes that this is bigger than her and that she is not alone: "I couldn't do a lot of things that other kids could do when [I] was a kid and I don't want any other little girls to have to go through that because of the new abortion law."[61] Thompson's life and future will change drastically if she is unable to access her medication.

Despite the necessity of these drugs for nonabortion purposes, patients face barriers obtaining their prescriptions even where the law does not explicitly mention these drugs or ban abortion.[62] Much of the problem stems from vaguely worded laws and uncertainty among prescribers and pharmacists about what remains lawful under abortion bans and restrictions.[63] Violating these laws can result in criminal charges and even

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55. Christensen, *supra* note 3.

56. *Id.*

57. Bud Foster, *14 Year Old Girl Denied Medication Because of New Abortion Law Speaks Out*, KOLD NEWS 13 (Oct. 4, 2022, 11:59 PM), https://www.kold.com/2022/10/04/14-year-old-girl-denied-medication-because-new-abortion-law-speaks-out/.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Schwartz, for example, lived in Virginia, where abortion remained legal, when she was denied methotrexate. Christensen, *supra* note 3.

63. Swapna Reddy et al., *Parallel Crisis by State Lines: The Unintended Consequences of Dobbs in Health Care*, 5 CLINICS MED., article 1051, 2022, at 7, 7-8, https://www.medtext

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prison time.[64] Thus, in response to increasingly restrictive laws, some healthcare providers and pharmacists are wary of prescribing or dispensing these medications for nonabortion purposes because of their connection to abortion.[65] In fact, a law in Texas explicitly includes "methotrexate" in the definition of "[a]bortion-inducing drug."[66] And although it includes an exception for drugs "that may be known to cause an abortion but [are] prescribed, dispensed, or administered for other medical reasons," this has not prevented fears and hesitancy among prescribers, dispensers, and users of the drug.[67]

The legal risks and uncertainties surrounding these drugs have resulted in providers stopping prescriptions, and some pharmacies now refuse to carry or dispense the drugs.[68] While conscience laws have long allowed individual providers to opt out of prescribing or dispensing drugs based on religious, ethical, or moral objections, this is no longer a situation involving a few "rogue individual pharmacists acting unilaterally" based on their individual beliefs.[69] On the contrary, several major pharmacy chains have enacted policies requiring patients to provide verification from the prescribing healthcare provider that the drug is not being used for abortion.[70] Without

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publications.com/open-access/parallel-crisis-by-state-lines-the-unintended-consequences-of-dobbs-1323.pdf.

64. Under Texas law, for example, it is a "state jail felony" to "intentionally, knowingly, or recklessly" provide an abortion-inducing drug to a person who is over forty-nine days' gestation. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.063(c)(6), 171.065 (West 2024).

65. Reddy et al., *supra* note 63, at 8 (noting several cases of healthcare providers and pharmacists refusing to provide medication and care with pregnancy termination related drugs in response to anti-abortion laws).

66. TEX. HEALTH & SAFETY CODE ANN. § 171.061(2).

67. *Id.*; *see also* Marin Wolf, *Pharmacists Are in Limbo Under Texas Abortion Laws*, DALLAS MORNING NEWS (July 18, 2022, 5:01 AM), https://www.dallasnews.com/news/public-health/2022/07/18/pharmacists-are-in-limbo-under-texas-abortion-laws/.

68. Christensen, *supra* note 3; *see also* Foster, *supra* note 57; Megan Liscomb, *A Doctor Just Declined to Prescribe This Patient Their Arthritis Treatment Because It Could Hurt a Fetus That Doesn't Even Exist*, BUZZFEED (July 5, 2022), https://www.buzzfeed.com/meganeliscomb/carolina-doctor-wont-prescribe-methotrexate.

69. Laura Weiss, *After* Roe*'s Repeal, CVS Told Pharmacists to Withhold Certain Prescriptions*, NEW REPUBLIC (July 20, 2022), https://newrepublic.com/article/167087/roe-cvs-methotrexate-abortion-pills.

70. Press Release, Am. Med. Ass'n (AMA), Statement on State Laws Impacting Patient Access to Necessary Medicine (Sept. 8, 2022), https://www.ama-assn.org/press-center/press-releases/statement-state-laws-impacting-patient-access-necessary-medicine; Weiss, *supra* note 69 (detailing a memo from CVS informing pharmacists on the company's new policy of verification requirements for certain prescriptions).

such verification, these pharmacy chains will not dispense the drug.[71] After *Dobbs*, for example, CVS circulated a memo to pharmacies in "high-risk states" stating that "[w]hen dispensing a prescription for Misoprostol or Methotrexate to women of child-bearing potential in states that prohibit dispensing medications for the purpose of inducing abortion, Pharmacists should validate that the intended indication is not to terminate a pregnancy."[72]

Even when patients can still access their prescriptions, many are now required to first go through additional steps. These added processes are patronizing, demeaning, paternalistic, and unnecessary. Patients describe feelings of humiliation, discrimination, and being treated like criminals.[73] Moreover, these laws strip patients of their autonomy, interfere with the patient-provider relationship, and infringe on a provider's training and expertise. Dr. Deborah Jane Power, Thompson's doctor, explains her frustration: "My 25 years as a physician, what I've learned, what I've trained, all the extra hours of study, is just being tossed away by lawmakers . . . . For some patients it's incredibly serious, it's the medication that's keeping their disease under control."[74]

Undoubtedly, barriers to accessing these medications will disparately impact women, and specifically, women with chronic conditions who require medication management to simply get through their daily lives, let alone become pregnant and give birth. The memo from CVS, for example, makes clear that the extra verification is only required for prescriptions dispensed to "*women of child-bearing potential*."[75] Men, including those with the same conditions, will not face these same burdens.

B. Management of Pregnancy and Chronic Conditions

Section A described how anti-abortion laws impact nonpregnant persons' access to essential medications for nonabortion purposes. At the other end of the spectrum, preventing pregnancy, getting pregnant, staying pregnant, and ensuring a healthy pregnancy may now be more difficult and burdensome for people with chronic conditions. The experience of pregnancy may be different and more difficult for individuals with chronic conditions, "whose

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71. *See* Weiss, *supra* note 69.
72. *Id.*
73. Christensen, *supra* note 3.
74. Foster, *supra* note 57.
75. Weiss, *supra* note 69 (emphasis added).

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symptoms and treatments have serious implications for all aspects of reproductive health."[76]

Due to their conditions or the medications they take to manage their conditions, persons with chronic conditions may want to prevent pregnancy through the use of contraceptives, including emergency contraceptives. Interestingly, data suggest that women with chronic health conditions are more likely to experience an unintended pregnancy than women without chronic conditions.[77] Access to highly effective contraceptives, as well as effective management of contraceptive use, is imperative for many persons with chronic conditions who wish to avoid unintended pregnancies that may further exacerbate their conditions. Others may need to closely manage drug interactions between hormonal contraceptives and other medications, such as anticonvulsants, which may be used to treat their conditions.[78]

The fallout from *Dobbs* may extend beyond abortion and implicate a host of other important rights, including the right to contraceptives. Although the *Dobbs* majority attempted to assure the public that *Dobbs* does not "call[] into question" cases like *Griswold v. Connecticut*[79] and *Eisenstadt v. Baird,*[80] which established the right to contraceptives, the dissent in *Dobbs* written by Justices Breyer, Sotomayor, and Kagan questions that assertion. According to the dissenting Justices, "[t]he majority could write just as long an opinion" using its reasoning and analysis in *Dobbs*—based largely on the conclusion that the right to an abortion is not "deeply rooted in this Nation's history and tradition"[81]—to conclude "that until the mid-20th century, 'there was no support in American law for a constitutional right to obtain

76. Diane Thompson et al., *Chronic Illness, Reproductive Health and Moral Work: Women's Experiences of Epilepsy*, 4 CHRONIC ILLNESS 54, 54 (2008).

77. Julie Chor et al., *Unintended Pregnancy and Postpartum Contraceptive Use in Women with and Without Chronic Medical Disease Who Experienced a Live Birth*, 84 CONTRACEPTION 57, 59 (2011).

78. *See* Mary E. Gaffield et al., *The Use of Hormonal Contraception Among Women Taking Anticonvulsant Therapy*, 83 CONTRACEPTION 16, 16 (2011).

79. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (establishing the right of married couples to buy and use contraceptives based on a right to privacy inferred from the Constitution).

80. Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (extending the holding in *Griswold* to unmarried persons).

81. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 363 (2022) (Breyer, J., Sotomayor, J. and Kagan, J., dissenting); *id.* at 231.

https://digitalcommons.law.ou.edu/olr/vol77/iss1/5

[contraceptives].'"[82] Many scholars agree with the dissent's analysis on this point.[83]

Of perhaps greater concern is the willingness of at least one current Justice to altogether reconsider the right to contraceptives and more. Justice Thomas, in his concurring opinion in *Dobbs*, wrote: "[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*"[84]—cases that established rights to contraceptives, same-sex intimacy, and same-sex marriage, respectively.[85] While some commentors claim that such concerns are "hyperbolic,"[86] the

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82. *Id.* at 363 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting) (citation omitted).

83. Rebecca Reingold, Associate Director of the O'Neill Institute at Georgetown University Law Center, for example, notes the risks for contraception, stating that "[a]dvocates of restrictions on access to contraception may argue that the right to contraception similarly 'destroys a potential life.'" Olivia Goldhill, *Supreme Court Decision Suggests the Legal Right to Contraception Is Also Under Threat*, STAT (June 24, 2022), https://www.statnews.com/2022/06/24/supreme-court-decision-suggests-the-legal-right-to-contraception-is-also-under-threat/; *see also* Opinion, *'Abortion Is Just the Beginning': Six Experts on the Decision Overturning Roe*, N.Y. TIMES, https://www.nytimes.com/interactive/2022/06/24/opinion/politics/dobbs-decision-perspectives.html (last visited Mar. 28, 2024) (providing the opinions of experts from various disciplines about the potential implications of *Dobbs*); Erik Larson & Emma Kinery, *Same-Sex Marriage, Contraception at Risk After Roe Ruling*, BLOOMBERG L. NEWS (June 24, 2022, 2:45 PM), https://news.bloomberglaw.com/us-law-week/supreme-court-justices-disagree-on-scope-of-dobbs-ruling (citing Jenny Pizer, the Law and Policy Director for Lambda Legal, who agrees with the dissent's concerns); Becky Sullivan & Juliana Kim, *These 3 Supreme Court Decisions Could Be at Risk After Roe v. Wade Was Overturned*, NPR (June 24, 2022, 1:23 PM), https://www.npr.org/2022/05/05/1096732347/roe-v-wade-implications-beyond-abortion ("[S]ome legal experts say that Alito's language may not be enough to keep such a ruling from being used to challenge other rights [including contraception] down the road."); Myah Ward, *Alito's Roe Draft, Beyond Abortion*, POLITICO NIGHTLY (May 3, 2022, 8:00 PM), https://www.politico.com/newsletters/politico-nightly/2022/05/03/alitos-roe-draft-beyond-abortion-00029725 (similar).

84. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (2022) (Thomas, J., concurring).

85. *Lawrence* invalidated sodomy laws across the United States, thereby legalizing same-sex sexual activity in the United States. Lawrence v. Texas, 539 U.S. 558, 578 (2003). *Obergefell* ruled that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Obergefell v. Hodges, 576 U.S. 644, 672 (2015).

86. Melissa Murray, Opinion Guest Essay, *How the Right to Birth Control Could Be Undone*, N.Y. TIMES (May 23, 2022), https://www.nytimes.com/2022/05/23/opinion/birth-control-abortion-roe-v-wade.html (citing commentators who claim that the risks to other rights like contraception are "little more than hyperbolic 'catastrophizing'"); *see also* Akhil Reed Amar, *The End of Roe v. Wade*, WALL ST. J. (May 14, 2022), https://www.wsj.com/articles/the-end-of-roe-v-wade-11652453609 (describing concerns about threats to a range of basic rights as "dire assessments" that "don't stand up to scrutiny"); The Editorial Board,

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Dobbs decision makes clear that no right is guaranteed and that the current Court may be willing to revisit and overturn decades-old precedent. As Professor Melissa Murray astutely noted in response to the leaked draft of the *Dobbs* opinion[87]:

> To quote Justice Antonin Scalia, "it takes real cheek" for Justice Alito to insist that the draft opinion's logic can be confined to abortion and does not implicate any other rights. The document, if finalized, will not simply lay waste to almost 50 years' worth of precedent—it will provide a blueprint for going even further.[88]

Reproductive justice advocates should avoid engaging in slippery-slope catastrophizing, but it is imperative that the threat be perceived as real and urgent. If these last few years have made anything clear, it is that many states, through explicit or implicit measures, are significantly restricting the full panoply of reproductive health care.[89] And some politicians have suggested they would consider banning or restricting contraceptives, particularly emergency contraceptives like Plan B and intrauterine devices (IUDs).[90] In

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Opinion, *Alito Doesn't Want Your Contraceptives*, WASH. POST (May 15, 2022, 4:41 PM), https://www.wsj.com/articles/samuel-alito-doesnt-want-your-contraceptives-supreme-court-griswold-roe-v-wade-11652450423 (referring to concerns about risks to same-sex marriage and contraception as an "implausible parade of horribles").

87. On May 2, 2022, a draft opinion of Justice Alito's majority opinion in *Dobbs* overturning *Roe* and *Casey* was published by *Politico*. *See* Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473. The bulk of the opinion remained largely unchanged, with the exception of some discussion of the concurring and dissenting opinions.

88. Murray, *supra* note 86; *see also* Paul Waldman, Opinion, *Liberals Are Right to Panic About What Will Follow Roe's Demise*, WASH. POST (May 5, 2022, 2:56 PM), https://www.washingtonpost.com/opinions/2022/05/05/liberals-not-overstating-roes-demise/ ("[L]iberals are not being hyperbolic when they warn about the retrograde right-wing revolution that could follow the end of *Roe*.").

89. Julie Rovner, *Abortion Bans Drive Off Doctors and Close Clinics, Putting Other Health Care at Risk,* NPR (May 23, 2023, 5:00 AM), https://www.npr.org/sections/health-shots/2023/05/23/1177542605/abortion-bans-drive-off-doctors-and-put-other-health-care-at-risk ("[W]hen clinics that provide abortions close their doors, all the other services offered there also shut down, including regular exams, breast cancer screenings, and contraception."); Rachel Treisman, *States with the Toughest Abortion Laws Have the Weakest Maternal Supports, Data Shows*, NPR (Aug. 18, 2022, 6:00 AM), https://www.npr.org/2022/08/18/1111344810/abortion-ban-states-social-safety-net-health-outcomes.

90. Certain types of IUDs can also be used as a method of emergency contraception, although they are not approved by the FDA for that purpose. *See Emergency Contraception: Practice Bulletin Number 152*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (ACOG)

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Idaho, for example, House State Affairs Committee Chairman Brent Crane indicated that he would be willing to hold hearings on legislation banning emergency contraceptives.[91] Although he stated that he supports contraception, he also stated that he is "not for certain yet where I would be on [IUDs]."[92] And amid the push for fetal personhood laws, some would define life as beginning at conception, potentially leading to bans on certain contraceptive methods.[93]

When individuals with certain chronic conditions become pregnant, they are more likely to experience high-risk pregnancies and complications—either because of their underlying conditions or the medications they take to manage their conditions. Indeed, "[e]ven when well controlled, maternal chronic health conditions can increase the risk of adverse outcomes during pregnancy."[94] These increased risks include high blood pressure, preeclampsia, placental issues, preterm delivery, fetal growth issues, pregnancy-related deaths, and miscarriage—which may require medical management that is increasingly hard to access as states crack down on abortion-related services, including miscarriage management.[95] As a result, individuals with chronic conditions who become pregnant may prefer to terminate their pregnancies, given the risks to their health. Yet, post-*Dobbs*, many women are denied the ability to make this choice, despite the consensus

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(Sept. 2015), https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2015/09/emergency-contraception (reaffirmed 2022).

91. Ian Max Stevenson, *After Roe Decision, Idaho Lawmakers May Consider Restricting Some Contraception*, IDAHO STATEMAN (May 10, 2022, 5:35 PM), https://www.idahostatesman.com/news/politics-government/state-politics/article261207007.html.

92. *Id.* For additional examples of how contraceptives may be limited after *Dobbs*, see Allison M. Whelan, *Aggravating Inequalities: State Regulation of Abortion and Contraception*, 46 HARV. J. L. & GENDER 131, 166-70 (2023).

93. *See UVA Law Professor Explains How Some States Could Move to Ban IUDs, Morning-After Pill*, CBS19 NEWS (July 31, 2023, 6:47 PM), https://www.cbs19news.com/story/47005104/uva-law-professor-explains-how-some-states-could-move-forward-to-ban-iuds-and-the-morning-after-pill.

94. Lori M. Gawron et al., *Multi-Morbidity and Highly Effective Contraception in Reproductive-Age Women in the US Intermountain West: A Retrospective Cohort Study*, 35 J. GEN. INTERNAL MED. 637, 637 (2019).

95. *See* Maryam Guiahi & Anne Davis, *First-Trimester Abortion in Women with Medical Conditions*, 86 CONTRACEPTION 622, 622 (2012) (stating that women with certain chronic conditions "face an increased risk of adverse health events during pregnancy"); *Chronic Health Conditions and Pregnancy*, MARCH OF DIMES, https://www.marchofdimes.org/find-support/topics/planning-baby/chronic-health-conditions-and-pregnancy (last reviewed Mar. 2019); Lauren Elizabeth, *Overturning Roe v. Wade Will Harm People with Chronic Illness*, HUFFPOST (May 10, 2022, 5:45 AM), https://www.huffpost.com/entry/roe-chronic-illness-abortion_l_62797682e4b0d7ea4cd0a17f.

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from family planning professionals that "[w]hen chronically ill women decide to end their pregnancies, *prompt abortion care* coupled with highly effective postabortion contraception reduces pregnancy-associated morbidity and mortality."[96]

As mentioned previously, in addition to pregnancy risks that result from the chronic condition itself, medications used to manage chronic conditions may be contraindicated during pregnancy. For example, pregnant persons who wish to remain pregnant should not use misoprostol and methotrexate because these drugs might terminate a pregnancy. Other medicines might not terminate a pregnancy but may risk fetal harm. Many anti-epileptic drugs (AEDs), for example, are associated with fetal abnormalities like spina bifida, brain development problems, and problems with the heart, urinary, or genital systems.[97] There are some AEDs that are safer to take during pregnancy, but patients must prepare and plan well in advance to taper off their current medication and start a new medication before becoming pregnant.[98] Of course, pregnancies are not always planned. Suddenly changing AEDs, such as in the event of an unplanned pregnancy, is not advised because it can cause severe seizures that harm the pregnant person or the fetus.[99] As a result, a person with epilepsy who experiences an unintended pregnancy and who does not have access to abortion may be left with an impossible choice: continue their pregnancy while taking their current medication, thereby risking severe fetal abnormalities, or quickly change or stop their medication during the pregnancy, risking their own life and the life of the fetus.

Pregnant persons with cancer or who receive a cancer diagnosis during pregnancy face a similar predicament: they can either continue their pregnancy and forego cancer treatment until they give birth or obtain an abortion. Many standard treatments for certain types of cancer, such as radiation, hormone therapies, and targeted drug therapies, are not safe during pregnancy. When there is a conflict between the standard of care treatment for the cancer and the well-being of the fetus, tough choices may be required.

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96. Guiahi & Davis, *supra* note 95, at 622 (emphasis added).

97. *See* Mark S. Yerby, *Clinical Care of Pregnant Women with Epilepsy: Neural Tube Defects and Folic Acid Supplementation*, 44 EPILEPSIA (SUPPLEMENT 3) 33, 33 (2003); Naymee J. Velez Ruiz, *Pregnancy: Can Certain ASMs Affect the Development of My Baby's Body?*, EPILEPSY FOUND. (Nov. 5, 2023), https://www.epilepsy.com/treatment/medicines/pregnancy.

98. *See* Yerby, *supra* note 97, at 38; Ruiz, *supra* note 97; *Epilepsy and Pregnancy: What You Need to Know*, MAYO CLINIC (Aug. 12, 2022), https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/pregnancy/art-20048417.

99. *See Epilepsy and Pregnancy: What You Need to Know*, *supra* note 98.

Yet some pregnant persons may no longer have a choice. States that ban or restrict abortion typically include exceptions for "medical emergencies," but the term is often vaguely defined, causing confusion among patients and healthcare providers about the applicability of these exceptions.[100]

For example, Texas defines a medical emergency for purposes of the exception as "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed."[101] Yet doctors find themselves unsure of when this applies:

- How "sick" does a pregnant person have to be to fall within the exception?
- If the standard of care is to start cancer treatment as soon as possible, but it is *technically* possible to delay treatment until after birth, is the situation enough of an "emergency" to justify an abortion under an exception? If the delayed treatment merely *reduces* the chance of survival but does not make survival impossible, does the exception apply?
- What if the delayed treatment, rather than the pregnancy itself, places a woman in danger? Does the exception apply if the pregnancy *itself* is not the direct cause of the harm?
- What if the cancer is terminal, such that there is really no "life" to save?
- What if continuing the pregnancy requires the pregnant person to stop taking a medication that will exacerbate their symptoms or increase their pain but will not put their life at risk?
- What if the fetus, not the mother, has a terminal condition and the exceptions do not include fatal fetal abnormality?

Dr. Jessica Rubino, an abortion provider at Austin Women's Health Center in Texas was told by her lawyer that "[u]nless they are on that table *dying in front of you*, you cannot do an abortion on them or you are breaking

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100. *Human Rights Crisis: Abortion in the United States After Dobbs*, HUM. RTS. WATCH (Apr. 18, 2023, 12:01 AM), https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs.

101. TEX. HEALTH & SAFETY CODE ANN. § 171.002(3) (West 2024); *see also* Oriana González, *Texas Abortion Lawsuit Puts Medical Exceptions Under Spotlight*, AXIOS (Mar. 7, 2023), https://www.axios.com/2023/03/07/texas-abortion-lawsuit-medical-exceptions.

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the law."[102] Even if the legislators did not intend the exception to be applied in such a strict and narrow manner, the reality remains: the vague laws require lawyering at the bedside. This reality chills the provision of medically necessary services. These consequences will disparately impact pregnant persons with chronic conditions, who are more likely to face complications and risks during pregnancy that may not fall clearly within an exception. The breadth of the harm remains to be seen, but Dr. Rubino describes where she thinks states like Texas are headed: "If you are pregnant in Texas and you don't leave the state, and you're sick, you're medically complicated, you just will die from your pregnancy."[103]

Restrictive reproductive healthcare laws and policies may ultimately place people with chronic conditions in impossible positions: wanting to avoid pregnancy or safely manage pregnancy while facing limited access to contraceptives, abortion, and medical professionals who are equipped to handle high-risk pregnancies.[104]

C. Infertility Treatment and Genetic Screening

Ironically, restrictive state abortion laws may also affect individuals who *want* to have a child. Individuals with certain chronic conditions may be more likely to struggle with infertility and therefore require the use of ART to become pregnant.[105] *Dobbs* and the restrictive state laws that followed are

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102. Aria Bendix, *How Life-Threatening Must a Pregnancy Be to End It Legally?*, NBC NEWS (June 30, 2022, 12:57 PM), https://www.nbcnews.com/health/health-news/abortion-ban-exceptions-life-threatening-pregnancy-rcna36026 (emphasis added).

103. *Id.*

104. Obstetricians, including those who handle high-risk pregnancies, have started to flee states with restrictive abortion laws, resulting in the closure of clinics and even entire labor and delivery departments at hospitals. *See, e.g.*, 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 ("All told, more than a dozen labor and delivery doctors — including five of Idaho's nine longtime maternal-fetal experts — will have either left or retired by the end of this year."); Julie Rovner & KFF Health News, *Abortion Bans Are Driving Off Doctors and Putting Basic Health Care at Risk*, SCI. AM. (May 25, 2023), https://www.scientificamerican.com/article/abortion-bans-are-driving-off-doctors-and-putting-basic-health-care-at-risk/; Danielle Campoamor, *Idaho Hospital Closes Its Maternity Ward, Citing the State's 'Political Climate'*, TODAY (Mar. 22, 2023, 4:22 PM), https://www.today.com/parents/pregnancy/idahos-bonner-general-hospital-closes-maternity-ward-rcna75776.

105. *See Infertility*, CLEV. CLINIC, https://my.clevelandclinic.org/health/diseases/16083-infertility (last updated Apr. 19, 2023); *see also* Elspeth Alstead, *Fertility and Pregnancy in Inflammatory Bowel Disease*, 7 WORLD J. GASTROENTEROLOGY 455, 456 (2001) ("[F]ertility is impaired in women with active Crohn's disease."); *id.* ("[I]t is inadvisable to conceive when

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raising fears that other nonabortion reproductive healthcare services will be curtailed, particularly those that implicate embryonic or fetal life, as is the case with ART.[106]

The greatest concerns stem from the possibility of "fetal personhood." As Justice Alito wrote in *Dobbs*, the majority opinion "is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests."[107] Decisions about personhood, like decisions about abortion, are thus left to the individual states. Fetal personhood could be a logical next step for the anti-abortion movement, and it is already taking shape in some states.

In 2019, Georgia Governor Brian Kemp signed into law the Living Infant Fairness and Equality Act ("LIFE Act").[108] The law was almost immediately blocked by a lawsuit, but it went back into effect after *Dobbs*.[109] Among other things, this law prohibits all forms of abortion after detection of a fetal heartbeat, which occurs around six weeks gestation and before many people know they are pregnant.[110] In November 2022, Fulton County Superior Court Judge Robert McBurney ruled that the six-week abortion ban was invalid, allowing Georgia's prior abortion law, which allows abortions until approximately twenty weeks gestation, to go back into effect.[111] On October 24, 2023, the Georgia Supreme Court upheld the state's six-week abortion

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[Crohn's disease] is active, but if conception occurs, an aggressive therapeutic strategy is indicated as there is clear evidence in Crohn's disease that disease activity is associated with pre-term birth and low-birth weight and some suggestion that early miscarriage may be increased.").

106. Chloe Reichel & Seema Mohapatra, *Assisted Reproduction in a Post-Dobbs US*, BILL OF HEALTH (May 8, 2023), https://blog.petrieflom.law.harvard.edu/2023/05/08/assisted-reproduction-in-a-post-dobbs-world/.

107. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 254 (2022).

108. Living Infants Fairness and Equality (LIFE) Act, H.B. 481, 154th Leg. (Ga. 2019); *see also* Phoebe Varunok, Comment, *The Georgia Life Act: Limiting Women's State Constitutional Right to Privacy*, 28 AM. U. J. GENDER, SOC. POL'Y & L. 247, 254 (2020).

109. Associated Press, *Georgia's Highest Court Reinstates Ban on Abortion After 6 Weeks*, NPR (Nov. 23, 2022, 2:41 PM), https://www.npr.org/2022/11/23/1139039767/georgia-supreme-court-reinstates-abortion-ban.

110. Patricia Mazzei & Alan Blinder, *Georgia Governor Signs 'Fetal Heartbeat' Abortion Law*, N.Y. TIMES (May 7, 2019), https://www.nytimes.com/2019/05/07/us/heartbeat-bill-georgia.html (stating that the ability to discern a fetal heartbeat is a milestone that often occurs before some women know they are pregnant).

111. Trial Order at 1, SisterSong Women of Color Reprod. Just. Collective v. State, No. 2022CV367796, 2022 WL 16960560 at *1 (Ga. Super. Ct. Nov. 15, 2022).

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ban.[112] The case remains ongoing, however, because the court addressed only one legal theory argued by the parties.[113] The court sent the case back to the lower courts to consider two separate questions: whether the Georgia state constitution protects a right to privacy and whether abortion is encompassed in that right.[114]

Other portions of the LIFE Act remained unaffected by the ongoing litigation. This includes a fetal personhood provision, which defines "natural person" as "including any unborn child with a detectable human heartbeat."[115] This provision leads to a number of explicit and implicit changes. The explicit changes include:

- Imposing child support payments on fathers for "direct medical and pregnancy-related expenses of the mother of the unborn child" as soon as cardiac activity is detected.[116]
- Providing for the recovery of damages for the homicide of a fetus as soon as there is a detectable heartbeat.[117]
- Allowing prospective parents to claim a fetus as a "dependent minor" for tax purposes.[118]
- Including fetuses with a detectable heartbeat in population-related counts.[119]

Initially, questions remained about the implicit implications of the LIFE Act on other provisions of the Georgia Code. For example, another Georgia law allows drivers to use the High Occupancy Vehicle (HOV) lane if the vehicle is "occupied by two or more persons."[120] The official Georgia Department of Public Safety requirements on HOV-lane usage used to say

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112. David W. Chen, *Georgia Supreme Court Allows State's Six-Week Abortion Ban to Remain in Effect*, N.Y. TIMES (Oct. 24, 2023), https://www.nytimes.com/2023/10/24/us/georgia-abortion-ban-supreme-court.html.

113. *Id.*

114. *Id.*

115. GA. CODE ANN. § 1-2-1(d) (West 2024). The U.S. Court of Appeals for the Eleventh Circuit held that the Act's definition of natural person is not "unconstitutionally vague on its face." SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga., 40 F.4th 1320, 1328 (11th Cir. 2022).

116. *Id.* § 19-6-15(a.1)(2).

117. *Id.* § 19-7-1(c)(1).

118. *Id.* § 48-7-26.

119. *Id.* § 1-2-1(d).

120. *Id.* § 32-9-4(a)(3).

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"vehicles with two or more (living and not pre-infant) persons."[121] Post-*Dobbs*, when the LIFE Act went back into effect, the DPS removed the phrase "living and not pre-infant" from the requirements.[122]

Georgia's LIFE Act does not explicitly implicate the use of ART such as in vitro fertilization (IVF). In IVF, a woman's egg is fertilized with sperm in a lab to make embryos, which are then transferred into the uterus in hopes of achieving pregnancy.[123] When fertilization and implantation occur, there is no fetal heartbeat, so the LIFE Act's restrictions would not be implicated. Nevertheless, fertility specialists fear that the LIFE Act "could open the door to new restrictions on [IVF] and other [ART]."[124] As states increasingly try to stamp out all abortions, the concern is that state laws will broaden the personhood language to include any embryo from the moment of fertilization. The ramifications of such laws could be drastic. Would this mean that all the embryos must be implanted? Would the law allow embryos to be frozen? Would the law require leftover embryos to be donated for use in another person's pregnancy?

The consequences for ART may seem speculative, but they are beginning to be felt by users of ART.[125] Use of fertility drugs and/or ART is more likely to produce multifetal pregnancies, which are pregnancies with twins, triplets, or more.[126] According to the American College of Obstetrics and Gynecology (ACOG), "Infants born after a multifetal pregnancy are at increased risk of prematurity, cerebral palsy, learning disabilities, slow language

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121. Susanna Capelouto, *Georgia HOV Lanes Now Open for Pregnant People, State Officials Confirm*, WABE (Sept. 2, 2022), https://www.wabe.org/georgia-hov-lanes-now-open-for-pregnant-people-state-officials-confirm/. The quoted language can be found in archived versions of the requirements, such as *High Occupancy Vehicle (HOV) Lanes*, GA. DEP'T OF PUB. SAFETY, https://web.archive.org/web/20210425095343/https://dps.georgia.gov/high-occupancy-vehicle-lanes (last visited July 23, 2024).

122. Capelouto, *supra* note 121.

123. *IVF (In Vitro Fertilization)*, CLEV. CLINIC, https://my.clevelandclinic.org/health/treatments/22457-ivf (last updated Mar. 2, 2022).

124. Jess Mador, *Georgia's Abortion Law Is More Uncertainty for Patients Undergoing Fertility Treatments*, WABE (Oct. 24, 2022), https://www.wabe.org/georgias-abortion-law-is-more-uncertainty-for-patients-undergoing-fertility-treatments/.

125. Consider Alabama, where the State Supreme Court ruled in February 2024 that embryos are "unborn children." As a result of that ruling and concerns about the legality of IVF in the state, at least four of Alabama's seven fertility clinics have started to transfer embryos outside of the state. *See* Azeen Ghorayshi & Sarah Kliff, *I.V.F. Threats in Alabama Drive Clinics to Ship Out Embryos*, N.Y. TIMES (Aug. 12, 2024), https://www.nytimes.com/2024/08/12/health/ivf-embryos-alabama.html.

126. *ART and Multiple Births*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/key-findings/multiple-births.html (last updated Apr. 1, 2016).

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development, behavioral difficulties, chronic lung disease, developmental delay, and death."[127] Multifetal pregnancies are associated with a fivefold increased risk of stillbirth, a sevenfold increased risk of neonatal death, and increased maternal risks such as hypertension, preeclampsia, gestational diabetes, and postpartum hemorrhage.[128] Given these risks, pregnant people may consider a multifetal pregnancy reduction, which ACOG defines as a first-trimester or early-second trimester procedure that reduces the number of fetuses in a multifetal pregnancy by one or more.[129] It does not end the pregnancy entirely, but it does destroy at least one fetus.[130] Clearly, in states that ban all abortions or ban abortions after detection of a fetal heartbeat, pregnant people may not be able to avail themselves of this option that can reduce the risks of a multifetal pregnancy for both the pregnant person and the remaining fetus.

Laura Miller, from Texas, experienced the fallout firsthand. At eight weeks, Miller learned she was pregnant with twins.[131] But in the thirteenth week of pregnancy, she learned that one of the fetuses had a fatal genetic condition, and his continued development would put the other fetus at greater risk for complications and preterm birth.[132] None of her providers fully explained her options because selective reduction would not be allowed under Texas law. One OB-GYN, who specializes in high-risk pregnancies, was blunt, telling Miller that the fetus would not "make it to birth."[133] Without getting specific, he said, "You can't do anything in Texas, and I can't tell you anything further in Texas, but you need to get out of state."[134] The decision to selectively reduce a pregnancy is extremely difficult and

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127. *Multifetal Pregnancy Reduction: Committee Opinion Number 719*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (ACOG) (Sept. 2017), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2017/09/multifetal-pregnancy-reduction.

128. *Id.*

129. *Id.*

130. *Cf.* Judith Daar, *The Impact of Dobbs on Assisted Reproductive Technologies: Does It Matter Where Life Begins?*, BILL OF HEALTH (May 9, 2023), https://blog.petrieflom.law.harvard.edu/2023/05/09/the-impact-of-dobbs-on-assisted-reproductive-technologies-does-it-matter-where-life-begins/ ("[Selective reduction] kills an unborn child but (ideally) does not terminate the pregnancy. Today's abortion laws conflate the death of an unborn child with pregnancy termination, such that an act to cause one is presumed to result in the other, without exception.").

131. Selena Simmons-Duffin, *To Safeguard Health Twin in Utero, She Had to 'Escape' Texas for Abortion Procedure*, NPR (Feb. 28, 2023, 12:02 PM), https://www.npr.org/sections/health-shots/2023/02/28/1154339942/abortion-texas-laws-twins-selective-reduction.

132. *Id.*

133. *Id.*

134. *Id.*

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personal; no pregnant person wants to be in that situation. Yet by eliminating the ability to choose, the laws place both fetuses and pregnant persons at risk.

Another consideration is that many chronic conditions have a genetic component. Reproductive decision-making is always fraught with many considerations and potential complications, but these magnify for persons who have or carry a gene for a genetic condition. Indeed, "[r]eproductive decision-making is a complex process" for people with chronic conditions; it is "[e]thically and psychologically stressful" and can involve conflicting beliefs and desires, such as the avoidance of suffering and the desire for children.[135]

People with chronic conditions who want to have children must consider not only the risks to their own health caused by pregnancy but also the risks of their conditions for future children. Historically, reproduction was a wild card, with little ability to control whether, when, and how it happened. While advancements in technology allow much greater reproductive control, anti-abortion and fetal personhood laws place all of this at risk.

Prospective parents with known genetic conditions may now use ART services like preimplantation genetic diagnosis (PGD) or prenatal diagnostic testing to prevent their future child from enduring the pain and suffering of a chronic condition such as cystic fibrosis or sickle cell anemia.[136] Prenatal diagnostic testing,[137] which is used after implantation, may be used in the absence of PGD, perhaps due to accessibility or affordability. Prenatal diagnostic tests include procedures like amniocentesis and chorionic villus sampling (CVS).[138] The timing of these tests is different, but the purpose is similar: to determine whether the embryo has a condition serious enough to warrant (1) not implanting the embryo (PGD) or (2) terminating the

135. Lidiia Zhytnik et al., *Reproductive Options for Families at Risk of Osteogenesis Imperfecta: A Review*, 15 ORPHANET J. RARE DISEASES, article no. 128, May 27, 2020, at 1, 14, https://ojrd.biomedcentral.com/counter/pdf/10.1186/s13023-020-01404-w.pdf.

136. *See generally* Frances A. Flinter, *Preimplantation Genetic Diagnosis*, 322 BRIT. MED. J. 1008 (2001); *Genetic Conditions*, BRIGHAM & WOMEN'S HOSP., https://www.brighamandwomens.org/obgyn/infertility-reproductive-surgery/genetic-conditions (last visited Mar. 28, 2024); *I Have a Genetic Disease in My Family*, HUMAN FERTILISATION & EMBRYOLOGY AUTH. (Sept. 1, 2023), https://www.hfea.gov.uk/i-am/i-have-a-genetic-disease-in-my-family/.

137. Prenatal diagnostic testing would occur during the pregnancy, after implantation, whereas PGD would be used before the embryo is implanted.

138. Amniocentesis is usually performed between sixteen and twenty weeks of pregnancy; CVS is typically performed around eleven to thirteen weeks of pregnancy. *Prenatal Genetic Testing*, CLEV. CLINIC, https://my.clevelandclinic.org/health/diagnostics/24136-pregnancy-genetic-testing (last reviewed Sept. 9, 2022).

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pregnancy (PGT). Abortion restrictions make it impossible for some people to act on the results of PGT, and there is concern that the fetal personhood movement will also infringe on the use of PGD.[139]

Any discussion of disability and reproductive decision-making must acknowledge ongoing debates about the use of PGD, prenatal diagnostic testing, and "disability-based abortions," as well as the tensions between disability rights advocates and reproductive justice advocates. Indeed, disability is "intertwined in the history of eugenics [and] linked in contemporary discourses about abortion rights."[140] Yet the tensions that this history created are frequently and unfairly exploited and exacerbated by abortion opponents. Claiming to care about antidiscrimination, opponents emphasize disability-based abortion bans to "win over ambivalent voters and legislators who are concerned about disability discrimination" and to "dampen the enthusiasm of those angry about abortion restrictions."[141] Abortion opponents claim that abortions based on fetal disability are "the height of prejudice,"[142] whereas abortion rights advocates generally emphasize how abortion can prevent newborn suffering and provide options to pregnant persons faced with devastating fetal diagnoses.[143]

Similar to discussions about race, these narratives exploit divisions between advocates for reproductive rights and disability rights, inhibiting successful collective advocacy and collaboration.[144] And yet, the expressed concerns of abortion opponents about equality and antidiscrimination fall flat, as they tend to simultaneously and hypocritically disregard the discriminatory effects of other anti-abortion laws they promote, which harm the very people they claim to serve.[145] Opponents of abortion focus on

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139. *See generally* Kerry Lynn Macintosh, *Dobbs, Abortion Laws, and In Vitro Fertilization*, 26 J. HEALTH CARE L. & POL'Y 1 (2023); Daar, *supra* note 130.

140. Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2046, 2048, 2051 (2021).

141. Mary Ziegler, *The Disability Politics of Abortion*, 2017 UTAH L. REV. 587, 597; *id.* at 621.

142. National Right to Life (@nrlc), TWITTER (Sept. 27, 2019, 3:00 PM), https://perma.cc/L2Y5-TEUZ.

143. *See Personal Stories: How Bans on Abortion Later in Pregnancy Hurt People*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion/federal-and-state-bans-and-restrictions-abortion/20-week-bans/personal-stories-reveal-how-20-week-abortion-bans-would-hurt-wom (last visited Mar. 28, 2024); *see also* Murray, *supra* note 140, at 2060-62. *See generally* Ziegler, *supra* note 141.

144. For an account of the role of race in the abortion debate, see Murray, *supra* note 140, at 2031-62.

145. NIKITA MHATRE, NAT'L P'SHIP FOR WOMEN & FAMILIES, AUTISTIC SELF ADVOC. NETWORK, ACCESS, AUTONOMY, AND DIGNITY: ABORTION CARE FOR PEOPLE WITH

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hypothetical disabled fetuses at the expense of those who actually bear the brunt of anti-abortion laws: pregnant persons with disabilities, who become a mere afterthought, collateral damage in the war against reproductive justice.

Should protections for potential life (i.e., embryos and fetuses) continue to expand, the rights and the autonomy of pregnancy-capable persons and pregnant persons with disabilities will be diminished. Restrictive and punitive laws will make for even more difficult choices about whether, when, and how to have a child for those who suffer from chronic, potentially inheritable conditions.

III. Dismantling the Burdens of Disability: An Incremental Approach

In prior work, Michele Goodwin and I predicted that the political movement to deny abortion rights would eviscerate gains made toward disability justice, as well as many other social justice gains such as LGBTQ+ equality.[146] In response to a dearth of thoughtful and thorough discussion about the impact of abortion restrictions on persons with physical disabilities, we advocated for intersectional coalition building to further the reproductive justice discourse, advance abortion rights, and amplify disability justice for individuals with physical disabilities.[147]

Much remains to be learned as the post-*Dobbs* landscape continues to evolve, but it cannot be denied that the evisceration of rights and justice for many vulnerable populations, under the guise of protecting maternal and fetal health, continues. These populations include persons of color, persons with physical and mental disabilities, those living in rural areas, minors, the LGBTQ+ community, immigrants and noncitizens, and victims of domestic violence and sexual assault.

Expanding upon that prior work, this Article broadens that argument, asserting that the population of pregnancy-capable persons with chronic

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DISABILITIES 11 (2021); *see also* Ziegler, *supra* note 141; Kimberly Ciesemier, *Leave My Disability Out of Your Anti-Abortion Propaganda*, N.Y. TIMES (July 31, 2022), https://www.nytimes.com/2022/07/31/opinion/disability-rights-anti-abortion.html ("Despite the fact that abortion opponents would champion my disabled 'life' in my mom's womb, the laws they've levied across the country now put my life and that of other disabled and chronically ill people in danger . . . .").

146. Allison M. Whelan & Michele Goodwin, *Abortion Rights and Disability Equality: A New Constitutional Battleground*, 79 WASH. & LEE L. REV. 965, 968-69 (2022).

147. *Id.*

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conditions should be considered within the broader disability community for purposes of advocating for reproductive justice and legal change.[148]

To the disability justice community, this may seem obvious. Chronic conditions align with the definition of "disability" used in the Americans with Disabilities Act.[149] That said, "popular imagination tends to think of disability as mobility, sensory, and learning impairments."[150] Yet a chronic condition, just like any other disability, can "substantially limit[] . . . major life activities."[151] But the limitations, and the severity of the limitations, may be less obvious or even invisible for conditions such as chronic pain, fatigue, or those that demand dietary modifications. And unlike physical disabilities such as quadriplegia, the limitations imposed by chronic conditions may be unpredictable, unstable, and inconsistent. Problematically, these characteristics of chronic conditions too often cause others to disbelieve or discount the suffering that a person experiences.[152]

In the wake of *Dobbs*, reproductive justice advocates have experienced feelings of despair and hopelessness. Such despair must become a catalyst for change and a force that unites groups for larger, broader, and louder advocacy. Reproductive justice advocates and disability justice advocates must continue to work together, and it is imperative that people with chronic conditions be given space for their specific experiences to be heard.

In the face of what seems like ever-mounting state restrictions on abortion and reproductive health care, it is difficult to know where to start and how to proceed. It seems unlikely that abortion rights will receive federal protections any time soon, if ever. To begin, the reproductive justice movement should, perhaps ironically, take a page from the anti-abortion movement, similar to how the anti-abortion movement took a page from the "progressive playbook

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148. At the same time, it is important to recognize that people with disabilities have different preferences when identifying themselves. There is no single way to define disability, and every individual should have the right to determine how they wish to define their existence and identity.

149. 42 U.S.C. § 12102.

150. Ria Mukherji, *Chronic Illness Is Not Widely Viewed as Disability. This Needs to Change*, HARV. GRAD. SCH. OF EDUC.: DISABILITY DISCLOSED, https://osa.gse.harvard.edu/chronic-illness-not-widely-viewed-disability-needs-change (last visited Mar. 28, 2024).

151. 42 U.S.C. § 12102(1) (defining "disability"); *id.* § 12102(2) (defining "major life activities").

152. *See, e.g.*, Stephanie McManimen et al., *Dismissing Chronic Illness: A Qualitative Analysis of Negative Health Care Experiences*, 40 HEALTH CARE FOR WOMEN INT'L 241, 249-50 (2019) (describing the experiences of disbelief from a healthcare provider); Benjamin J. Newton et al., *A Narrative Review of the Impact of Disbelief in Chronic Pain*, 14 PAIN MGMT. NURSING 161, 161-62 (2013).

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that achieved breakthroughs on civil rights, gay marriage and even abortion."[153] Just as the anti-abortion movement's win in *Dobbs* was achieved by slowly chipping away at abortion rights, the reproductive justice movement must rebuild abortion rights piece-by-piece. It took years to achieve abortion rights through *Roe*. It took years for the anti-abortion movement to chip away at *Roe*. And it will take years to reinvigorate protections for, accessibility to, and affordability of reproductive health care. As Professors Mary Ziegler and Robert Tsai astutely observe: "[N]o gains are ever permanent. Reversals of fortune are possible."[154]

One of the first steps toward reinvigorating reproductive rights could involve the disability community, particularly those with chronic conditions. Advocates must emphasize the data that demonstrate how pregnancy poses dangers for persons with chronic conditions when the full panoply of reproductive health care is unavailable. Advocates should therefore argue for clearer and broader exceptions to abortion bans. Many of even the most restrictive abortion laws contain exceptions for when the pregnant person faces death or when there is a "serious risk of substantial and irreversible impairment of a major bodily function."[155] These exceptions can vary significantly from state to state and often lack specific definitions or clarity about the types of impairments that would qualify. The vague language of existing exceptions makes it difficult for healthcare providers to know if a health issue would fall under the exception, and this difficulty is "exacerbated by the lack of deference given to clinicians' medical judgment under these bans."[156]

It is clear that abortion opponents will not be persuaded by the "right to choose" or the "my body, my choice" narrative. But when it comes to chronic conditions, the consequences are more predictable and tangible, and they should be used to argue for broader and clearer health exceptions. Reproductive justice and disability justice advocates throughout the United States should argue for and propose exceptions to save the lives of pregnant persons; prevent impairment of physical or mental functions; and prevent the

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153. Mary Ziegler & Robert L. Tsai, *How the Anti-Abortion Movement Used the Progressive Playbook to Chip Away at Roe v. Wade*, POLITICO (June 13, 2021, 7:00 AM), https://www.politico.com/news/magazine/2021/06/13/anti-abortion-progressive-roe-v-wade-supreme-court-492506.

154. *Id.*

155. Mabel Felix et al., *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KAISER FAM. FOUND. (May 18, 2023), https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services/.

156. *Id.*

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exacerbation of existing diseases, disabilities, or conditions. Medical professionals should also join the movement to ensure that legislatures define all terms in a clear and medically accurate manner, so that healthcare professionals feel comfortable actually *applying* the exception.

Going further, when healthcare professionals act under one of these exceptions, the law should establish a rebuttable presumption that the abortion was provided in accordance with the exception if the pregnant person has a diagnosed and documented chronic condition. This presumption will shift the burden to the state to prove that the doctor did not properly apply the exception. Currently, some states place the burden on the provider to prove the exception, framing it as an "affirmative defense" rather than an exception.[157] Flipping the burden could make providers more comfortable when applying the exception.

To protect access to essential medications that many people with chronic conditions rely on but that may also be used to cause a medication abortion, a similar rebuttable presumption should apply. That is, when a patient has a diagnosed and documented chronic condition requiring pharmaceutical treatment, there should be a rebuttable presumption that the medication is necessary for the management of the chronic condition (provided that it aligns with standards of care and the best interests of the patient).

As described previously, the anti-abortion movement may ultimately have consequences for much more than abortion. Advocates should therefore push for new laws that explicitly protect the right to ART and preimplantation and prenatal diagnostic testing, especially when used to prevent fetal death or suffering. In advocating for such changes, it is important for the disability justice community to lead the fight and to mitigate claims from anti-abortion advocates that this amounts to "disability discrimination."[158]

Advocating for piecemeal change may be frustrating and unsatisfying, and the path forward will be long. But comprehensive protections for abortion will not reemerge overnight. In the face of sociopolitical realties, advocates should focus on incremental gains. Changes that protect the life and health of those already suffering from chronic conditions or disabilities would be just the first step, but it may be one that is most palatable to anti-abortion advocates. Indeed, a recent survey found that a very small minority of Americans (nine percent) believe that abortion should be illegal in all

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157. *Id.*; 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.

158. For more about the relationship between disability and abortion politics, see *supra* notes 140-46 and accompanying text.

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circumstances.[159] The majority believes that abortion should be legal in all cases when (1) the patient's health is endangered (sixty-six percent), (2) the patient's life is endangered (seventy-four percent), (3) the pregnancy is the result of rape or incest (seventy-four percent), (4) the fetus is not expected to survive (sixty-three percent), and (5) the fetus is expected to have serious birth defects (fifty-six percent).[160] In contrast, forty-two percent of respondents to this survey believe that abortion should be legal in all circumstances for people "who do not wish to be pregnant."[161] What this and other studies make clear[162] is that the best chance of incremental success is through first targeting these exceptions. Voters must make their preferences known and act on these preferences during elections. Too often, politicians are elected with far more extreme views than their constituents, resulting in laws that are out of touch with the electorate and the ideals of a democracy.

It is time for the disability justice community, along with expert medical professionals, to start charting the way for incremental change. The road ahead may be long and winding, but it is one worth taking. The lives, health, and well-being of millions depend on it. Incremental and hard-won change will keep the reproductive-justice movement motivated to continue its fight. People with chronic conditions must have a seat at the table, and their voices must be heard, given the outsized impact of anti-abortion laws and policies on their lives, health, and control over whether, when, and how to have a child as safely as possible.

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159. Shefali Luthra, *Total Abortion Bans Are Not At All Popular; Poll Finds*, THE 19TH (Sept. 18, 2023, 4:00 AM), https://19thnews.org/2023/09/poll-abortion-americans-complex-views/.

160. *Id.*

161. *Id.*

162. *Id.*; *see also* Laura Wronski, *PORES | SurveyMonkey Poll: Abortion*, NBC NEWS (Oct. 2022), https://www.surveymonkey.com/curiosity/pores-poll-abortion/ (finding that eight in ten respondents who identified as Republican believe that abortion should be legal if the pregnancy puts the women's health in serious danger, and fifty-nine percent believe abortion should be legal if the fetus has a serious birth defect likely to require serious medical care and limit the infant's quality of life).

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