

BORDER (REPRODUCTIVE) CONTROL: UNCONSTITUTIONAL OUTCOMES FOR UNDOCUMENTED PEOPLE SEEKING ABORTION CARE

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ABSTRACT

It is no secret that restricted access to reproductive care, especially in the wake of Dobbs v. Jackson Women’s Health, disproportionately impacts poor, non-white women and pregnant people. Among the most vulnerable are undocumented Latino individuals in the United States. Undocumented individuals who are or may become pregnant face a heightened set of challenges as they try to navigate (or avoid) a complex, hostile, and inefficient immigration system at the southern border while simultaneously seeking abortion care in states where access is virtually non-existent. Even before Dobbs, inhumane immigration policies and abortion restrictions, particularly in Texas—the first point of entry for many immigrants—created an inhospitable environment for pregnant individuals seeking reproductive care. Now, with Dobbs conferring the right to regulate abortion completely to the states, arbitrary, inconsistent, and unconstitutional outcomes abound for undocumented pregnant individuals seeking care across states with vastly different reproductive landscapes.

The conflicting health outcomes experienced by undocumented pregnant individuals seeking abortion care did not happen in a vacuum, nor is Dobbs the solitary catalyst for these unconstitutional effects. Rather, this Note highlights the complex historical and political frameworks in which racist, sexist, and anti-immigrant narratives have been festering for years, and argues that the resulting disparate outcomes violate the Equal Protection Clause of the Fourteenth Amendment. Similarly situated undocumented individuals should receive similar access to reproductive care, regardless of where they are seeking services. Such inconsistent health outcomes are harmful and unconstitutional.

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INTRODUCTION

The decision to overturn *Roe v. Wade* has had unimaginable, widespread impacts for people who can become pregnant of all backgrounds.¹ Children who have become pregnant as a result of rape have been forced to travel out of state for care.² Studies indicate that in the fourteen states with abortion bans implemented

1. HUM. RTS. WATCH, *Human Rights Crisis: Abortion in the United States After Dobbs* (Apr. 18, 2023), <https://perma.cc/3BPD-W6ZH>; Risa E. Kaufman & Katy Mayall, *One Year Later: Dobbs v. Jackson Women's Health Organization in Global Context*, AM. BAR. ASSOC. (July 26, 2023), <https://perma.cc/8JND-GSLE>; Deborah Turner, *One Year After Dobbs: The Medical Impact of Anti-Abortion Laws*, LEAGUE OF WOMEN VOTERS (June 22, 2023), <https://perma.cc/N4KU-C7ZR>; Camille Kidd, Shaina Goodman, & Katherine Gallagher Robbins, *State Abortion Bans Threaten Nearly 7 Million Black Women, Exacerbate the Existing Black Maternal Mortality Crisis*, NAT'L P'SHIP FOR WOMEN & FAM. (May 2024), <https://perma.cc/K2K5-97FM>; Laura Valle-Gutierrez, *The Dobbs Decision's Cost to Women and Families*, THE CENTURY FOUND. (Aug. 18, 2022), <https://perma.cc/L5Y4-32QE>; see Marc Spindelman, *Trans Sex Equality Rights After Dobbs*, 172 U. PA. L. REV. ONLINE 2 (2023); Robin Maril, *Queer Rights After Dobbs v. Jackson Women's Health Organization*, 60 SAN DIEGO L. REV. 48 (2023).

2. See David Folkenflik & Sarah McCammon, *A Rape, an Abortion, and a One-Source Story: A Child's Ordeal Becomes National News*, NAT'L PUB. RADIO (July 13, 2022), <https://perma.cc/JNN4-PBBS>; Cara Tabachnick, *Ohio Man Sentenced to Life in Prison for Rape of 10-year-old Girl Who Traveled to Indiana for Abortion*, CBS NEWS (July 5, 2023), <https://perma.cc/RX3Q-AUKG>.

post-*Dobbs*, it is estimated that “519,981 survivors of completed rape experienced 64,565 rape-related pregnancies during the 4 to 18 months that bans were in effect.”³ Women like Kate Cox of Texas have been denied abortion access because they were not quite sick enough to meet the maternal health exception, forcing them to make the unimaginable choice to either wait at home for their health to deteriorate and hope the state grants them access, or cross state lines to receive care.⁴ Another Texas woman, Marlena Stell, spent *two weeks* looking for a doctor who was willing to remove a fetus from her body that had already passed.⁵ Rampant confusion is plentiful among doctors and patients in states with abortion bans, leaving both with little guidance on how, when, and where one can receive or administer abortion care.⁶ And one study found that post-*Dobbs*, OBGYNs report an increase in maternal mortality, as well as racial and ethnic inequities in maternal health.⁷ These anecdotes tell just a few stories of the real life implications that the *Dobbs* decision and subsequent state-wide abortion bans have had on individuals’ bodily autonomy and available reproductive care.

However, many individual’s stories, often people of color, young people, poor people, and immigrants never get told. In particular, the stories of undocumented people who can become pregnant and the circumstances they face as they navigate the immigration system, specifically at the U.S.–Mexico border, are often invisible. For those who successfully make the treacherous journey across the border into the United States, abundant confusion, harsh restrictions, and constant fear of deportation severely limit the choices available to undocumented individuals, particularly in the reproductive healthcare space. Moreover, enormous discrepancies among state abortion laws create arbitrary, inconsistent, and unpredictable outcomes for

3. Samuel L. Dickman, Kari White, David U. Himmelstein, Emily Lupez, Elizabeth Schrier, & Steffie Woolhandler, *Rape-Related Pregnancies in the 14 US States With Total Abortion Bans*, 184 JAMA INTERNAL MED. 330, 331 (2024). This study also notes that even in states with rape or incest exceptions for their abortion bans, the lack of available abortion providers within the state makes these exceptions utterly meaningless, as survivors who meet the exceptions would likely still have to travel for care. *Id.*

4. See Tracy Smith, *Texas Mother Kate Cox on the Outcome of Her Legal Fight for an Abortion: “It was crushing,”* CBS NEWS (Jan. 14, 2024), <https://perma.cc/TM8V-4M4H>.

5. Elizabeth Cohen, *One Year after Dobbs Decision, Families Describe Terror, Trauma and Putting ‘Pain to Purpose,’* CNN (June 22, 2023), <https://perma.cc/CCA9-RN7J>.

6. See Lauren Mascarenhas, *Texas Abortion Law’s Wording Is Causing Dangerous Confusion over Emergency Medical Exceptions, Critics Say*, CNN (Dec. 15, 2023), <https://perma.cc/8FDQ-3FJ6>; Katia Riddle, *Patients Struggle to Navigate Abortion with Changing Laws and Provider Confusion*, NAT’L PUB. RADIO (Oct. 25, 2023), <https://perma.cc/9SAV-4423>. See generally Bridget Balch, *What Doctors Should Know About Emergency Abortions in States with Bans*, AAMC (Sept. 26, 2023), <https://perma.cc/5MX8-9AA3> (discussing lack of clarity on qualifying abortion exceptions and the resulting fear among providers).

7. Brittini Frederiksen, Usha Ranji, Ivette Gomez, & Alina Salganicoff, *A National Survey of OBGYNs’ Experiences After Dobbs*, KFF (June 21, 2023), <https://perma.cc/FR9C-3JQE>. This same study also found that “[n]ationally, one in five office-based OBGYNs (20%) report they have personally felt constraints on their ability to provide care for miscarriages and other pregnancy-related medical emergencies since the *Dobbs* decision. In states where abortion is banned, this share rises to four in ten OBGYNs (40%).” *Id.*

undocumented individuals depending on where they cross the border and receive care.

Barriers to abortion access for undocumented immigrants are rooted in the history of U.S. immigration policy and were aggravated by the Trump Administration and the subsequent overturning of *Roe v. Wade*. This Note uses a constitutional framework to argue that irreconcilable differences in abortion access and outcomes for similarly situated undocumented women across states violates the Equal Protection Clause of the Fourteenth Amendment.

Under the current landscape, individuals with identical circumstances entering the United States face vastly different health outcomes depending on the state in which they enter, with no safe, accessible means to travel for care out of state. The divergent outcomes of two pregnant undocumented individuals, similar in every way except physical location, provided a catalyst for this Note and the research that supported it. The safety net provided to legal residents who are unhappy with the laws and policies of their state is the knowledge that they can, at least without any legal concerns, move to a state that better suits their needs and values.⁸ This option is not available to undocumented people, for reasons detailed throughout this Note. Thus, undocumented individuals are stuck, literally and figuratively, with the hand, and state, they are dealt.

Part I of this Note examines the Trump-era rhetoric and policy decisions that laid the groundwork for inhumane practices at the U.S.–Mexico border that primarily impacted Latino/a immigrants,⁹ including lack of abortion care, unethical gynecological procedures, and child/family separation. In particular, I argue that President Trump’s racist, inflammatory, and dangerous tropes about Latino/a immigrants gave a national platform for anti-immigrant sentiment that was already brewing in alt-right media and conservative communities around the country and laid the groundwork for injurious immigration policies that resulted in family separation and the detainment of thousands of pregnant people, particularly in states like Georgia and Texas. Part II highlights barriers faced by immigrants seeking reproductive care pre-*Dobbs* and explores the ways that these barriers have been exacerbated by the *Dobbs* decision and subsequent state laws and policies surrounding reproductive rights. This history, coupled with a national pandemic and the elimination of the constitutional right to abortion,¹⁰ has left undocumented individuals with no way to safely or consistently access reproductive care between states

8. It is well documented that other reasons exist for restraining a legal resident’s right to travel between states, including parole agreements and other criminal penalties. However, such analyses are beyond the scope of this Note.

9. This Note recognizes the complex, unique challenges that undocumented immigrants of all backgrounds and ethnicities and in all 50 states face as they move through or evade the U.S. immigration system. However, this Note primarily focuses on undocumented individuals at the southern border, the vast majority of whom identify as Latina/o, and the unique ways that their physical location in southern states impacts their access to reproductive care. The crux of the constitutional argument presented, however, is applicable to all undocumented immigrants.

10. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (holding that there is no federal right to abortion and conferring the right to regulate abortion to the states).

with varying state abortion laws. This Part also utilizes a firsthand account from a Texas abortion provider to ground and personalize the reality for undocumented people seeking reproductive care under strict abortion regimes. Most significantly, Part III argues that subjecting undocumented individuals to differing reproductive care options depending on the state in which they enter the country creates disparate and discriminatory outcomes and violates the Equal Protection Clause. Finally, Part IV concludes by offering several federal and state policy recommendations to safeguard undocumented individuals' right to abortion and other reproductive care regardless of their point of entry.

Something as important as reproductive autonomy should not be left up to chance or luck, especially when many undocumented immigrants are not privy to the abortion laws in the states they enter, nor could they feasibly alter their intended path even if they had such knowledge. The Equal Protection Clause applies to undocumented immigrants and should be applied in the context of abortion access. To do anything less is to deny undocumented immigrants equal protection under the law of the United States.

I. TRUMP-ERA ANTI-IMMIGRANT RHETORIC EXACERBATED ABUSE AT THE BORDER

Individuals and families crossing the border into the United States, largely from Central and South America, have been facing abuse, reproductive and otherwise, at the hands of Immigration and Custom Enforcement ("ICE"), Custom and Border Patrol ("CBP"), and even directly from presidential administrations, for decades.¹¹ That history of abuse was exacerbated by the Trump Administration and their staunch anti-immigrant policies and rhetoric, largely rooted in white supremacy,¹² that left families separated and immigrants at the border with little control

11. See Kyle Berlin, *ICE Program Foments Abuse, Hatred, and Fear — and Makes Us All Less Safe*, AM. C.L. UNION (Apr. 26, 2022), <https://perma.cc/JB4M-PSXC>; Adam Isacson & Zoe Martens, *Abuses at the U.S.- Mexico Border: How To Address Failures and Protect Rights*, WOLA (Aug. 2, 2023), <https://perma.cc/HB6C-TXCQ>; Greg Grandin, *The Border Patrol Has Been A Cult Of Brutality Since 1924*, THE INTERCEPT (Jan. 12, 2019), <https://perma.cc/BW3A-7JSQ>. See also Deborah Anthony, *The U.S. Border Patrol's Constitutional Erosion in the "100-Mile Zone"*, 124 PENN ST. L. REV. 391 (2020) (describing the constitutional leeway Custom and Border Patrol officers receive in the "100 mile zone" near the border for conducting searches, seizures, and other actions against immigrants); Lori A. Nessel, *Enforced Invisibility: Toward New Theories of Accountability for the United States' Role in Endangering Asylum Seekers*, 55 U.C. DAVIS L. REV. 1513, 1518 (2022) (employing "a historical and race-based lens to analyze the various components of the multi-faceted forced invisibility regime" under the Trump and Biden Administrations).

12. See Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 200 (2019) (from Stanford Law Review's "Symposium - 2019 - Immigration") (stating that "[t]he Administration has issued a dizzying array of policy changes that explicitly target or disproportionately affect noncitizens of color at the same time that President Trump's statements reflect racist intent. These policy changes represent the most wide-ranging Executive Branch attempt to restrict immigration policies in generations" and that "the President has parroted ideas of white cultural threat popular among white nationalists"). This essay also describes the racist history of federal immigration policy generally, including upholding the Chinese Exclusion Act in the late 1800s. *Id.* at 203.

over their bodies.¹³ To fully understand the current reproductive landscape for people who can become pregnant generally and immigrants in particular, it is crucial to explore the history of exploitative border practices and the ways in which the Trump Administration laid the groundwork for intensifying and normalizing such abuse. Part A examines the historical roots of non-consensual gynecological procedures as a means of control and the way these procedures are still used and abused by ICE, CBP, and other law enforcement officials in the immigration context. Part B recounts the abhorrent Trump-era “zero tolerance” policy that left families separated from their children at the border. Finally, Part C discusses additional instances of abuse at the hands of immigration officials, including child neglect and sexual abuse.

A. UNETHICAL GYNECOLOGICAL PROCEDURES

The United States has a long history of using forced sterilization and other non-consensual gynecological procedures as means to control and abuse people who can become pregnant, undoubtedly rooted in racism, sexism, and classism and grounded in the Eugenics movement more broadly.¹⁴ Far from a ghost of a dystopian past, unethical and nonconsensual gynecological exams and forced sterilization continue to be performed on detained individuals at the hands of doctors and officials at the border in an effort to control their reproductive choices.¹⁵ And as frightening as that reality is, it bears mentioning that forced sterilization is

13. See Tal Kopan, *Trump's Immigration Policies Have Especially Affected Women and Domestic Violence Victims*, CNN (Sept. 30, 2018), <https://perma.cc/J8TJ-62S9>. For an exploration and a critique of the Trump Administration's harmful “unseen” immigration policies, see Jaclyn Kelley-Widmer, *Unseen Policies: Trump's Little-Known Immigration Rules as Executive Power Grab*, 35 GEO. IMM. L. REV. 801, 804–05 (2021) (noting that “Hallmark Trump administration immigration policies—including family separation, the Muslim Bans, the Wall, and the Migrant Protection Protocols (or ‘Remain in Mexico’),—supplemented with anti-immigrant rhetoric, captured the national attention and set the tone of Trump's immigration policy as ‘aspiring authoritarianism’” and that “inhumane policies at the border and in detention centers spurred public outrage, action, and advocacy as the public received reports of detained children without access to soap and detained women forced to undergo hysterectomies. Yet, the public focus on the most captivating stories helped to obscure hundreds of more quotidian, but equally damaging, immigration laws and policies established by the Trump administration through executive orders, rulemaking, and statutory reinterpretation”).

14. See Sanjana Manjeshwar, *America's Forgotten History of Forced Sterilization*, BERKELEY POL. REV. (Nov. 4, 2020), <https://perma.cc/5GXC-NDQZ> (noting that “[t]he American eugenics movement originated in the late 1800s and has always been undeniably based in racism and nativism,” and that “California's ‘Asexualization Acts’ in the 1910s and 1920s led to the sterilization of 20,000 disproportionately Black and Mexican people who were deemed to be mentally ill.” Additionally, “[t]hroughout the 20th century, nearly 70,000 people (overwhelmingly working-class women of color) were sterilized in over 30 states. Black women, Latina/o women, and Native American women were specifically targeted. From the 1930s to the 1970s, nearly one-third of the women in Puerto Rico, a U.S. territory, were coerced into sterilization when government officials claimed that Puerto Rico's economy would benefit from a reduced population”). *Id.* This source aptly summarizes the grim, racist history of Eugenics and forced sterilization, primarily against women of color, and helps situate Trump's immigration policies.

15. Victoria Bekiempis, *More Immigrant Women Say They Were Abused by Ice Gynecologists*, THE GUARDIAN (Dec. 22, 2020), <https://perma.cc/GCK9-8K74>.

still legal in the United States due to a 1927 Supreme Court case called *Buck v. Bell*, which held that states can constitutionally forcibly sterilize their residents.¹⁶ In that case, “Carrie Buck, a ‘feeble minded woman’ whose mental illness had been in her family for the past three generations, was committed to a state mental institution and was set to undergo a sterilization procedure which required a hearing.”¹⁷ In his Majority opinion, J. Holmes stated that it is better if “society can prevent those who are manifestly unfit from continuing their kind.”¹⁸ This dangerous rhetoric, echoed nearly 100 years later by President Trump and his supporters,¹⁹ perpetuates the idea that there is a “right” or “ideal” citizen, and that those who do not fit this mold, including undocumented immigrants, are not worthy of reproductive bodily autonomy.²⁰ Although the use of these procedures on immigrants who can become pregnant has not gotten nearly the media coverage it deserves, there have been some accounts that document these horrific acts.

For example, in September 2020, Georgia resident and nurse Dawn Wooten came forward with allegations that a Georgia immigrant jail was performing unethical gynecological procedures on detained people.²¹ She worked as a nurse at the facility, and decided to speak about what she had observed, noting the matter was of public concern.²² Dawn’s bravery resulted in the loss of her job, but also an 18-month bipartisan federal investigation into the gynecological practices for detained people in the state.²³ The investigation ended with a 103-page report that confirmed what Wooten had claimed: “excessive, invasive, and often unnecessary” gynecological procedures were being performed on frightened and unwilling people at the Georgia detention center.²⁴ Six women were interviewed as part of the investigation, and their stories detail experiences of forced contraceptive

16. See *Buck v. Bell*, 274 U.S. 200 (1927).

17. See Manjeshwar, *supra* note 14.

18. *Buck*, 274 U.S. at 207. The legal justification and framework used in *Buck v. Bell* also became one of the models used by the Nazis to accomplish their sterilization regimen in the early 20th century. See Maya Manian, *Immigration Detention and Coerced Sterilization: History Tragically Repeats Itself*, AM. C.L. UNION (Sept. 29, 2020), <https://perma.cc/2BFR-FPZE>.

19. See Ernesto Sagás & Ediberto Román, *Build the Wall and Wreck the System: Immigration Policy in the Trump Administration*, 26 TEX. HISP. J. L. & POL’Y 21 (2020); see also Mary Vickers, “And Some, I Assume, Are Good People:” Examining the Impact of Donald Trump’s Presidency on the Lived Experiences of Latinx Teens (2020) (Honors Program Thesis, Rollins College) (on file with Rollins College).

20. For an examination of Trump’s immigration policies juxtaposed with his pro-life stance, see Lauren A. Varga, *Does Fear of Immigration Trump Love for Fetal Life? How Trump’s Policies Quietly Endanger Migrant Fetuses in Spite of the Administration’s Pro-life Agenda*, 35 GEO. IMM. L. J. 631, 634 (2021) (“... the key tenets of the pro-life legislative scheme are violated by immigration policies adopted by the Trump administration. Rather, federal policies, at minimum, deprioritize the health of fetuses unilaterally.”).

21. See Lautaro Grinspan, *Georgia ICE Whistleblower Files Suit Against Private Prison Company*, THE ATLANTA J.-CONST. (Jan. 11, 2023), <https://perma.cc/T5CT-6XNP>.

22. See *id.*

23. See *id.*; see also Lautaro Grinspan, *Senate Panel: Detained Immigrants in Ga. Endured Invasive OB-GYN Care*, THE ATLANTA J.-CONST. (Nov. 16, 2022), perma.cc/L5GU-U85M.

24. See Grinspan, *supra* note 23.

injections, unnecessary hysterectomies, and lingering questions about their own fertility.²⁵ Nearly 100 years later, these findings bring back *Buck v. Bell*-era concerns that “medical personnel are targeting vulnerable women for coerced sterilization based on their race, poverty, and immigration status.”²⁶

In addition to being coerced into exploitative, unnecessary, and nonconsensual gynecological procedures, immigrants also face restrictions when seeking wanted and needed gynecological care. For example, Nancy Gonzalez Hidalgo, an immigrant from Mexico, “was detained, separated from her family, and denied gynecological care for an incomplete miscarriage for nearly a year, despite uncontrollable bleeding and unrelenting pain.”²⁷ Carmen Puerto Diaz was also pregnant when she was detained and denied access to her hypertension pills—medication that was essential to her maintaining a healthy pregnancy.²⁸ She was subsequently given an unnamed pill and told to take it without any other information—a choice that could have cost her her pregnancy or even her life.²⁹

These stories, while shocking, are likely just the tip of the iceberg when it comes to the abuse that undocumented people have endured at the hands of ICE and CBP, especially during the Trump presidency. Prior to the Trump Administration, ICE was “practically forbidden” from detaining pregnant people unless the circumstances were extreme.³⁰ However, Donald Trump issued an Executive Order in 2017 that changed ICE’s policies for how it dealt with all undocumented immigrants, including pregnant people, and subsequently allowed ICE to detain pregnant individuals.³¹ As a result, ICE detained pregnant people over 4,600 times between 2016 and 2018.³² While the Biden Administration has, on paper, returned to the pre-Trump rule,³³ some pregnant people are still subject to

25. *See id.*

26. *See* Manian, *supra* note 19.

27. Brittany Leach, *At the Borders of the Body Politic: Fetal Citizens, Pregnant Migrants, and Reproductive Injustices in Immigration Detention*, 116 AM. POL. SCI. R. 116, 116–130 (2022).

28. *See* Natalia Megas, *ICE Jailed Pregnant Woman and Could’ve Killed Her Unborn Child*, THE DAILY BEAST (Jan. 30, 2019), <https://perma.cc/7P7L-YR7G>.

29. *See id.*

30. *Id.*; *see also* Abigail Abrams, *ICE Will Now Detain Pregnant Women Because of President Trump’s Executive Order*, TIME (Mar. 29, 2018), <https://perma.cc/Q8Y6-DUXD>.

31. *See id.*; *see also*, *Pregnant Immigrants and Asylum Seekers During COVID-19*, CTR. FOR REPRO. RTS. (Sept. 14, 2020) (discussing how the U.S. government exploited the Covid-19 pandemic to further human rights violations at the border), <https://perma.cc/C2TD-3NQ2>; Marissa McFadden, Christine Marie Velez, & Maria Mercedes Ávila, *Pregnant Migrant Latinas at the US Border: A Reproductive Justice Informed Analysis of ICE Health Service Policy During “Zero-Tolerance,”* J. HUM. RTS. SOC. WORK 341 (2022) (using a reproductive justice framework to highlight the impacts of Trump’s “zero tolerance” policy on detained Latina/o immigrants).

32. U.S. GOV’T ACCOUNTABILITY OFF., GAO 20-36, IMMIGRATION ENFORCEMENT ARRESTS, DETENTIONS AND REMOVALS, AND ISSUES RELATED TO SELECTED POPULATIONS 38 (Dec. 2019), <https://perma.cc/4DBG-2B5D>.

33. Eileen Sullivan, *Biden Will End Detention for Most Pregnant and Postpartum Undocumented Immigrants*, N.Y. TIMES (July 9, 2021), <https://perma.cc/43XR-9E5T>.

mandatory detention policies.³⁴ The lasting impacts of the Trump Administration's immigration policies continue to be felt most severely by undocumented individuals who are being exploited by, denied, or forced to undergo gynecological and reproductive care while detained.

B. FAMILY SEPARATION

There cannot be a robust conversation about the Trump Administration's immigration policies without mentioning the abhorrent family separation that occurred at the border during the Trump presidency.³⁵ In 2018, The Department of Justice ("DOJ") announced it was instituting a "zero tolerance" policy at the border, "dictating that all migrants who cross the border without permission, including those seeking asylum, be referred to the DOJ for prosecution."³⁶ As a result, children, hundreds of whom were under 5 years old, were separated from their undocumented parents and sent, in some cases, hundreds of miles away.³⁷ Horrifyingly, an estimate from the Department of Homeland Security ("DHS") in May 2018 warned the administration of just how many children would likely be separated that summer as a result of the policy, yet the Trump Administration took virtually no precautions to ensure that enforcement officers were keeping track of the separated children and their parents.³⁸ By late June

34. See Michelle Del Rey, *Texas' 2021 Abortion Restrictions Disproportionately Harm Immigrant Women, Experts Find*, RECKON (Sept. 1, 2023), <https://perma.cc/HMP8-Q6RV>. For a thoughtful analysis on the endemic of shackling pregnant incarcerated women during labor and childbirth generally, see also Priscilla Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1246 (2012) (noting that "the presumed race and gender identity of female prisoners has played an essential role in normalizing the use of shackles on pregnant prisoners, not only in formal incarcerative spaces, such as prisons, but also in institutions, such as detention centers, that have come to resemble prisons in critical respects").

35. See generally, Carrie F. Cordero, Heidi Li Feldman, & Chimène I. Keitner, *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 430 (2020) (providing a "comprehensive assessment of how domestic and international law limits the U.S. government's ability to separate foreign children from the adults accompanying them when they seek to enter the United States"); Jeffrey R. Baker & Allyson McKinney Timm, *Zero-Tolerance: The Trump Administration's Human Rights Violations Against Migrants on the Southern Border*, 13 DREXEL L. REV. 581 (2021) (using an international human rights law framework to critique Trump's zero tolerance policy); Stephen Lee, *Family Separation As Slow Death*, 119 COLUM. L. REV. 2319, 2327 (2019) (using the notion of "slow death," which "captures the kinds of harms that happen slowly and over time, which can often go overlooked or unnoticed," to contextualize and critique family separation policies). For an argument that family separation violates the Thirteenth Amendment, see Alexis Karteron, *Family Separation Conditions*, 122 COLUM. L. REV. 649 (2022); Ndjuoh MehChu, *Help Me to Find My Children: A Thirteenth Amendment Challenge to Family Separation*, 17 STAN. J. CIV. RTS. & CIV. LIBERTIES 133, 139 (2021) ("Highlighting underappreciated parallels between the forcible dislocation of migrant children from the adults accompanying them at the U.S.-Mexico border and the destruction of Black families during slavery, the Article suggests that the ongoing family separation crisis is properly understood as a matter of constitutional concern within the broad reach of the Thirteenth Amendment.").

36. *Family Separation – A Timeline*, SPLC (Mar. 23, 2022), <https://perma.cc/JYA3-GUDJ>. This source also notes that the Trump Administration had actually begun the practice of separating children from their parents at the border as early as March 2017 as a way to deter immigrants from entering the country. *Id.*

37. *Id.*

38. Jonathan Blitzer, *A New Report on Family Separations Shows the Depths of Trump's Negligence*, THE NEW YORKER (Dec. 6, 2019), <https://perma.cc/Y3MW-MYQ6>. See also Sarah Sherman-Stokes, *My*

2018, when a federal court ordered the Administration to reunite families, they did not have any way to do so.³⁹ In all, more than 5,000 children were separated from their parents at the border between 2017 and 2021, and as of September 2023, more than 1,000 children still had not been reunified with their parents,⁴⁰ despite President Biden's efforts to reverse the damage of the policy.⁴¹

The complete disregard for preserving and protecting familial relationships at the border further demonstrates how Trump-era anti-immigrant rhetoric normalized and even celebrated mistreatment of undocumented families in the name of protecting U.S. citizens and maintaining order at the border. And while family separation as a means of control and subordination is not a new phenomenon,⁴² Trump's zero-tolerance policy perpetuated and exacerbated the idea that protecting the sanctity of the family unit is a priority, unless you are talking about one of *those* types of families: Black, Brown, undocumented, poor, etc., that are inherently undeserving of protection, dignity, and respect.⁴³ "Othering" allows for abuse without guilt, and unfortunately, immigrants continue to be the invisible collateral damage in the federal quest for control over individuals who can get pregnant, their bodies, and their families.

Sharpie Marker Might be the Only Thing Keeping Migrant Mothers and Children Together, USA TODAY (Apr. 14, 2019), <https://perma.cc/NTR2-CXRA> (describing how one reporter "spent days at the border writing on children their parents' names and dates of birth, with the hope that mother and child might one day be reunited" because there was no adequate system in place to keep track of separated children and parents).

39. See Josh Gerstein & Ted Hesson, *Federal Judge Orders Trump Administration to Reunite Migrant Families*, POLITICO (June 26, 2018), <https://perma.cc/8A6Q-K64N>. See also Blitzer, *supra* note 38 ("What, exactly, was preventing D.H.S. officials from keeping track of the families they were separating? One major obstacle was that every agency involved in zero tolerance—from Border Patrol and ICE to the Office of Refugee Resettlement, at H.H.S.—had different data systems, and none of them had the capacity to synch up. The Inspector General's report provides a technical account of how these computer systems repeatedly buckled under the strain of zero tolerance. At Border Patrol, the computers had an immediate limitation. If an agent wanted to refer an immigrant parent for prosecution, he had to delete the entire family's file and create, instead, two separate files: one for the parent and another for the child.").

40. See Kristin Samuelson, *Why Are So Many Migrant Families Still Separated? Chaos in the Data*, NORTHWESTERN NOW (Oct. 26, 2023), <https://perma.cc/V86U-CBY8>.

41. Associated Press, *Biden Rescinds 'Zero Tolerance' Policy but Judge Blocks Halt to Deportations*, THE GUARDIAN (Jan. 21, 2021), <https://perma.cc/5N87-LZ9M>.

42. See MehChu, *supra* note 35. For historical analyses of the racist origins of family separation, see Vanessa M. Holden, *Slavery and America's Legacy of Family Separation*, BLACK PERSPECTIVES (July 25, 2018), <https://perma.cc/5RJA-RXGE>; see also Anita Sinha, *A Lineage of Family Separation*, 87 BROOK. L. REV. 445 (2022).

43. See generally, Srikantiah & Sinnar, *supra* note 12 at 200 ("Putting together the President's claims of cultural threat from immigration with his vilification of nonwhite immigrants, these statements suggest support for white nationalist ideas."); Mariela Olivares, *The Rise of Zero Tolerance and the Demise of Family*, 36 GA. ST. U. L. REV. 287 (2020) (arguing that "[p]olicies shifting away from family unity and towards an inhumane treatment of immigrant families is anchored in the political rhetoric that normalizes the oppression of immigrants. By characterizing immigrants as nonhuman—even 'animals,' as described by President Donald Trump—the current slate of anti-immigrant policies that specifically target families is normalized").

C. OTHER ABUSE AT THE BORDER

The atrocities of life in detention, particularly in the wake of the Trump Administration, do not stop or end with unethical gynecological exams or the zero-tolerance policy that resulted in thousands of children being separated from their families. Sexual violence, child abuse, and other forms of negligence are the reality for many undocumented individuals, particularly women and girls, at the hands of CBP and ICE officials in detention centers around the country.⁴⁴

Mari arrived in the United States in late 2021, seeking political asylum from Venezuela, and was transferred to a center in Georgia where she had her initial medical screening.⁴⁵ During the screening, a male nurse sexually abused her.⁴⁶ Several other women reported similar experiences with the same male nurse (but of course, the pattern of abuse at the hands of ICE transcends one single nurse at one facility).⁴⁷ In fact, “308 sexual assault and sexual abuse complaints [were] filed by immigrants detained in ICE facilities nationwide between 2015 and 2021” which involved “detention officers, contractual guards, and ICE employees.”⁴⁸ Alarming, at least five of the complaints allege that victims were threatened by ICE employees with deportation,⁴⁹ highlighting the complicated power dynamics that overlay such abuse. Further internal government reports obtained by the Human Rights Watch in 2021 detail “allegations of physical, sexual, and verbal abuse, due process violations, harsh detention conditions, denial of medical care, and discriminatory treatment at or near the border.”⁵⁰ The report makes clear that not only is systemic abuse a well-documented, known fact within DHS, but also that allegations are not being properly investigated.⁵¹

The horrors of sexual abuse and neglect at the border do not spare children, who are often the most vulnerable and susceptible to illness, mistreatment, and coercion. Jakelin Caal and Felipe Gomez Alonzo, 7 and 8 years old, respectively, both passed away in December 2018 at the hands of CPB officials.⁵² Jakelin passed away on December 8, 2018 from shock and dehydration only 36 hours

44. See Zeba Warsi, *Hundreds of Immigrants Have Reported Sexual Abuse at ICE Facilities. Most Cases Aren't Investigated*, PBS (July 21, 2023), <https://perma.cc/933Q-Y978>; Joshua Barajas, *A Second Migrant Child Died in U.S. Custody this Month. Here's What We Know*, PBS (Dec. 28, 2018), <https://perma.cc/U994-ATQY>; *US Records Show Physical, Sexual Abuse at Border*, HUM. RTS. WATCH (Oct. 21, 2021), <https://perma.cc/VW4B-6NGT>; see also Julián Aguilar, *Report: Crimes Against Migrants Waiting in Mexico to Seek U.S. Asylum Continue to Climb*, TEXAS TRIBUNE (Dec. 5, 2019), <https://perma.cc/38U6-HQFE> (reporting that “[m]ore than 630 violent crimes against asylum seekers affected by the Migrant Protection Protocols program have been reported in Mexico, according to a new report by Human Rights First”).

45. Warsi, *supra* note 44.

46. *Id.*

47. *Id.*

48. *Id.*; Zeba Warsi, *‘Immensely Invisible:’ Women Fighting ICE’s Inaction on Sexual Abuses*, FUTURO (July 21, 2023), <https://perma.cc/U72K-V4CD>.

49. Warsi, *supra* note 44; Warsi, *supra* note 48.

50. HUM. RTS. WATCH, *supra* note 44.

51. *Id.*

52. Barajas, *supra* note 44.

after being apprehended by border agents.⁵³ Felipe was taken to a hospital after exhibiting signs of severe sickness, but released shortly after when doctors diagnosed him with a common cold.⁵⁴ He died later that day, Christmas Day.⁵⁵ Jakelin and Felipe's deaths were entirely preventable,⁵⁶ and illustrate the frustrating and heartbreaking reality that undocumented children can so easily slip through the cracks, especially if they are without a parent or guardian to advocate for them.

Make no mistake, CBP and ICE officials have been failing women, children, and families for decades. But the Trump Administration and the immigration policies it promulgated normalized mistreatment of undocumented immigrants, resulting in heightened systemic abuse and neglect with very few ramifications. One racist, inflammatory statement at a time, Donald Trump amplified archaic beliefs about border security and immigration policy, and such rhetoric laid the groundwork for degrading narratives surrounding the appropriate treatment of undocumented immigrants.⁵⁷ These narratives, in turn, continue to frame and contextualize the current, post-*Dobbs* reproductive landscape that leaves undocumented individuals who can become pregnant, particularly in southern states, with divergent reproductive health outcomes depending on the state in which they enter, and with virtually no access to abortion care in states with bans.

II. BARRIERS TO ABORTION CARE FOR UNDOCUMENTED INDIVIDUALS PRE- AND POST-*DOBBS*

Abuse and reproductive healthcare challenges at the border did not start or end with the Trump Administration. Indeed, even before Trump or the *Dobbs* decision, undocumented people faced a host of barriers in their pursuit of reproductive health care that resulted in harmful, oppressive outcomes undergirded by a national history of injurious immigration policy.⁵⁸ This harm has since been magnified by the Trump Administration, discussed *infra* Part I, and by the Supreme Court decision in *Dobbs*. Without a constitutional right to abortion, undocumented individuals in states with bans have virtually no access to reproductive care and no feasible means to travel across state lines for assistance. These realities compound to create discriminatory outcomes for undocumented people seeking abortion care—a flagrant Equal Protection violation. Part A of this Section examines the procedural challenges faced by undocumented people during the immigration process and the lifelong impacts that immigration choices

53. *Id.*

54. *Id.*

55. *Id.*

56. *See id.*

57. *See* Srikanthiah & Sinnar, *supra* note 12.

58. *See* Dévora González (School of the Americas Watch) & Azadeh Shahshahani, *A History of Institutional Violence at the U.S. Border*, ALLIANCE FOR NETWORKING VISUAL CULTURE (June 5, 2020), <https://perma.cc/PZK9-GEDL>; Becky Little, *The Violent History of the U.S.-Mexico Border*, HISTORY.COM (Mar. 14, 2019), <https://perma.cc/6GZY-9PZQ>; Itamar Mann, *Border Violence As Crime*, 42 U. PA. J. INT'L L. 675 (2021) (offering “a comparative multi-regional analysis to assess the turn to criminal law and to anti-impunity as it has figured in attempts to enforce the rights of refugees and migrants”).

can have on people who can become pregnant, their health, and their families. Part B discusses the realities of the burdensome reproductive landscape for undocumented individuals even before the *Dobbs* decision overturned *Roe v. Wade*. Finally, Part C analyzes the heightened barriers faced by undocumented individuals after *Dobbs*.

A. THE REALITIES OF IMMIGRATION FOR UNDOCUMENTED PEOPLE WHO CAN BECOME PREGNANT

Immediately upon crossing the southern border into the United States, individuals and their families are faced with tough choices that have lasting impacts on their ability to receive medical and reproductive care. Whether seeking affirmative asylum or opting to remain undetected by U.S. enforcement officials, undocumented people who can become pregnant have historically faced a host of barriers to obtaining reproductive care in the United States, no matter how they choose to navigate the immigration system.⁵⁹ On the one hand, the process for receiving affirmative asylum entails affirmatively turning oneself in to U.S. Border officials upon entering the United States.⁶⁰ Meanwhile, undocumented immigrants can seek defensive asylum if they are detained after illegally entering the United States as a defense against removal.⁶¹

Given the low rates of successful asylum claims for individuals from Central and South America,⁶² a person choosing to enter the United States at the southern border may actually have more reproductive choices and potentially better outcomes if they opt not to affirmatively seek asylum, because they may be able to remain undetected and move between states to receive healthcare. That being said, undocumented individuals face additional barriers in states with abortion bans where they would likely need to travel to receive care because traveling across state lines puts them at heightened risk of deportation.⁶³ Additionally, because many undocumented people lack the English language skills and proper identification that would allow them to travel, the logistical barriers are just as

59. *See Immigrant Women's Access to Sexual and Reproductive Health Coverage and Care in the United States*, THE COMMONWEALTH FUND (Nov. 20, 2018), <https://perma.cc/K7NW-4TR5>.

60. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGRATION SERV'S, <https://perma.cc/K8AU-KJ7R> (describing in detail the seven step process for obtaining affirmative asylum as "STEP 1: Arrive in the U.S., STEP 2: Apply for Asylum, STEP 3: Fingerprinting and Background/Security Checks, STEP 4: Receive an Interview Notice, STEP 5: Interview, STEP 6: Asylum Officer Makes Determination on Eligibility and Supervisory Asylum Officer Reviews the Decision, STEP 7: Receive Decision").

61. *The Affirmative Asylum Process*, U.S. CITIZENSHIP AND IMMIGRATION SERV'S, <http://perma.cc/3RXW-WJR8> ("[A] defensive application for asylum occurs when you request asylum as a defense against removal from the United States. For asylum processing to be defensive, you must be in removal proceedings in immigration court with the Executive Office for Immigration Review (EOIR).").

62. *Executive Office For Immigration Review Adjudication Statistics*, DEP'T OF JUST. (2023), <https://perma.cc/GH25-P496>.

63. *See Is It Safe for Undocumented Immigrants to Travel within the United States?*, MINSKY MCCORMICK & HALLAGAN, P.C. (May 30, 2023), <https://perma.cc/49EU-7CKP>.

high as the legal ones.⁶⁴ Pre-*Dobbs*, undocumented individuals faced immense challenges when seeking abortion care. Post-*Dobbs*, the options are even more limited for those in need of abortion access in the United States, especially because so many immigrants cross the U.S. border into Texas,⁶⁵ which currently has one of the strictest abortion bans in the country.⁶⁶ The complexity and nuance of the asylum and immigration processes coupled with abortion restrictions post-*Dobbs* has left undocumented people with little control over their reproductive choices, particularly as they enter southern states with virtually no access to abortion.

B. IMMIGRANT ACCESS TO ABORTION PRE-*DOBBS*

Barriers for undocumented people seeking abortion care did not begin with the *Dobbs* decision. Part 1 describes the case of *Garza v. Hargan* and highlights the reproductive challenges faced by undocumented individuals even while *Roe* was still the law of the land. Part 2 details the immeasurable impact of Texas' Senate Bill 8 and examines the ways that states were chipping away at abortion access prior to *Dobbs*. Finally, Part 3 provides a firsthand account from a Texas abortion provider who describes the challenges he and his undocumented patients faced while providing and receiving abortion care in Texas pre-*Dobbs*.

1. *Garza v. Hargan*

Attempts to limit access to abortion for undocumented individuals, specifically in Texas, date much farther back than the *Dobbs* decision and the state-wide “trigger” bans that immediately followed. In the case of *Garza v. Hargan*, the Trump Administration attempted to prevent a 17 year old from receiving abortion care in Texas.⁶⁷ Referred to as “Jane Doe,” the pregnant teenager (“Garza” in legal proceedings—the name of her guardian at the time) was detained at a facility

64. See *id.*

65. See Alejandro Serrano, *Border Patrol Agents Recorded the Fewest Monthly Migrant Apprehensions Since 2021 on Southern Border*, TEXAS TRIBUNE (July 16, 2024), <https://perma.cc/HQ5P-ZCXV> (“During the 2023 fiscal year, Texas on average accounted for roughly 59% of migrant encounters along the southwest border.”); see also *Immigrants in Texas*, AM. IMMIGR. COUNCIL, <https://perma.cc/35HL-AXY7> (noting Texas’s “long history of immigration” and that “[i]mmigrants now account for over one-sixth of the state’s total population, and 12.3 percent of its U.S.-born residents live with at least one immigrant parent”).

66. See *After Roe Fell: Texas*, CTR. FOR REPRO. RTS., <https://perma.cc/8VWQ-L5JD> (“[T]exas’s trigger ban, which criminalizes abortion, took effect on August 25, 2022, following the U.S. Supreme Court’s decision to overturn *Roe v. Wade* in the case *Dobbs v. Jackson Women’s Health Organization*. Because abortion is now a crime in Texas, other criminal laws, including solicitation, aiding, attempt, and conspiracy, could apply to abortion. In 2022, the Texas Supreme Court prohibited only criminal enforcement of the pre-*Roe* abortion ban and allowed for civil enforcement. In 2023, the state created limited affirmative defenses to civil claims brought against physicians for treating ectopic pregnancies or providing miscarriage management.”) (citing Tex. Health & Safety Code §§ 170A.001-7).

67. J.D. v. Azar (Formerly *Garza v. Azar* and *Garza v. Hargan*) - *Challenging Trump Administration’s Refusal To Permit Teenage Immigration Detainees To Access Abortion Services*, AM. C.L. UNION D.C., <https://perma.cc/J385-3TTW>.

for unaccompanied minors and had been prevented from receiving an abortion by the Office of Refugee Resettlement (“ORR”).⁶⁸ In October 2017, the American Civil Liberties Union (“ACLU”) of DC filed an emergency lawsuit on her behalf in an attempt to challenge the Trump Administration’s policy which prevented teenage detainees from obtaining abortions.⁶⁹ Disturbingly, but unsurprisingly, given the accounts of unethical and non-consensual medical care experienced by immigrants discussed in Part I.A., “[s]he ha[d] already been subjected to egregious delays to her medical care as well as counseling and procedures without her consent . . .”⁷⁰

In addition to seeking emergency relief for the teen in the case, the ACLU’s motion for a preliminary injunction also identified additional instances where minors’ access to abortion care was obstructed, including “a young woman [who] was forcibly sent to an emergency room after she’d taken [an] abortion pill to try to prevent her from completing the abortion,” and an instance where “[ORR] Director Scott Lloyd personally visited a young woman who was seeking [an] abortion to attempt to dissuade her from her decision.”⁷¹ These tales describe a frightening trend, aggravated by the Trump Administration, of denying pregnant minors access to the care they needed even while the constitutional right to abortion was still the law of the land. Luckily, after much litigation that ultimately involved at least two other minor women who were also denied abortion access, Jane Doe was able to receive an abortion, and in 2020, the Government adopted a new policy “under which it would not interfere with immigrant minors’ access to abortion and related services and would adopt strict limits on disclosure of minors’ pregnancy and abortion information.”⁷² However, even pre-*Dobbs*, restrictive state laws such as Texas’s SB8 further complicated undocumented individuals’ access to reproductive care near the border and beyond.

68. *Id.*

69. *Id.*

70. *Id.* These delays and violations included: “The Department of Health and Human Services requir[ing] her to go to a government ‘approved’ counselor at a religiously affiliated, anti-abortion ‘Crisis Pregnancy Center,’ which urged her to continue her pregnancy. Federal officials forc[ing] her to have a medically unnecessary sonogram against her will. ORR block[ing] her from traveling to her medical visits, even after judicial authorization and after her court-appointed attorney and guardian offered to provide transportation to the abortion provider. She has also secured private funding for her abortion. Federal officials told Jane’s mother about her abortion despite her clear wishes not to tell her parents and despite Jane getting a court order under Texas law to consent to her abortion without notification of or consent from her parents. Jane did not want to involve her parents because they were physically abusive to an older sister who became pregnant.” *Id.*

71. *Garza v. Hargan - Challenge to Trump Administration’s Attempts to Block Abortions for Young Immigrant Women*, AM. C.L. UNION (Aug. 8, 2018), <https://perma.cc/DY2J-H9DP>.

72. See J.D. v. Azar (Formerly *Garza v. Azar* and *Garza v. Hargan*) - *Challenging Trump Administration’s Refusal To Permit Teenage Immigration Detainees To Access Abortion Services*, *supra* note 67; Brigitte Amiri & Meagan Burrows, *Victory: After Three Years of Battling in Court, the Trump Administration Abandons its Policy of Banning Abortion for Unaccompanied Immigrant Minors*, AM. C.L. UNION (Sept. 30, 2020), <https://perma.cc/H2GS-AENY>.

2. Undocumented Pregnant Individuals and Texas's Senate Bill 8

In 2021, after *Garza v. Hargan* and before the overturning of *Roe*, Texas passed Senate Bill 8 (“SB8”) which outlawed abortion after the detection of a fetal heartbeat and created a private right of action for citizens to sue anyone suspected of having or aiding in an abortion.⁷³ Because the time between SB8 and *Dobbs* spanned less than a year, the true impact of SB8 on Texas residents will never be totally measurable or quantifiable; however, one study notes that things like socio-economic status, race, and migrant-status likely played a role in determining who felt the adverse effects of SB8 most intensely.⁷⁴ Furthermore, Lupe M. Rodríguez, executive director of the National Latina Institute for Reproductive Justice, stated that undocumented women in Texas, of which there are over 800,000,⁷⁵ were disproportionately harmed by the ban.⁷⁶ Specifically, she notes the logistical barriers of traveling outside the state for abortion care, including lack of documentation as well as lack of access to federal healthcare programs and enrollment wait times of up to five years for legal permanent residents.⁷⁷ In situations where time is quite literally of the essence, such delays can mean the difference between two very different outcomes. And while it is difficult to make a direct link between immigration policy and health outcomes, Rodríguez notes that maternal mortality rates have been increasing for Hispanic and Latina women since 2020.⁷⁸

Additionally, although it is possible for pregnant unaccompanied minors, like Jane Doe in *Garza v. Hargan*, to be moved to a facility in a state without an abortion ban in order to receive care, Rodríguez says she has never actually seen that happen.⁷⁹ As a result of all of these challenges intensified by SB8, people in Latina/o communities are “just having unwanted pregnancies.”⁸⁰ On the heels of harmful Trump-era immigration policies and amidst the growing rate of abortion bans around the country, SB8 magnified an already dire situation for people who

73. See TEX. HEALTH & SAFETY CODE ANN. § 171.208 (A) (West, Westlaw current through the 2023 Reg., 2nd, 3rd, and 4th Called Sess. of the 88th Legis., and the Nov. 7, 2023 gen. election); Suzanne Bell, *A Spike in Births and Other Potential Impacts of Texas' Abortion Restrictions*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Aug. 31, 2023), <https://perma.cc/5Q3H-HYFD>. This study analyzed how SB8 impacted the number of births in Texas, finding a spike in births after the passage of the bill. While the study notes that the impacts of Texas' severe abortion ban were not felt uniformly among all women, the study did not seek to analyze who felt the adverse impacts most directly; see also Neelam Bohra, *Texas Law Banning Abortion as Early as Six Weeks Goes Into Effect as the U.S. Supreme Court Takes No Action*, TEXAS TRIBUNE (Aug. 31, 2021), <https://perma.cc/FKC6-QGXS>.

74. Bell, *supra* note 73.

75. *Profile of the Unauthorized Population: Texas*, MIGRATION POL'Y INST., <https://perma.cc/VU92-2CRC>.

76. Del Rey, *supra* note 34.

77. *Id.*; see also *5 Year Bar State Fact Sheets*, CHILDREN THRIVE ACTION NETWORK, <https://perma.cc/F9ZS-PZNS>.

78. See Del Rey, *supra* note 34 (“[i]n 2021 — the year S.B. 8 became law — 27.5 per 100,000 pregnant Hispanic women died from complications relating to pregnancy and childbirth, according to the U.S. Government Accountability Office.”).

79. *Id.*

80. *Id.*

can become pregnant, specifically undocumented people, stripping away their limited options for reproductive care and forcing them to make difficult, expensive, and potentially unsafe choices to manage their pregnancies.

3. Abortion Care for Undocumented Pregnant People in Texas: A Firsthand Account

To color the already devastating picture of life for undocumented pregnant individuals in Texas prior to *Dobbs*, I spoke to Dr. Samuel Dickman, the Chief Medical Officer of Planned Parenthood of Montana,⁸¹ who worked as the Medical Director for Primary Care at Planned Parenthood South Texas before and during the implementation of SB8. As an abortion provider in Texas during this incredibly hostile time, Dr. Dickman described stories that underscore just how much more limited the options were for undocumented pregnant people under the SB8 regime. Specifically, he recounted a story of an undocumented woman who sought abortion care from him shortly after SB8 went into effect. She disclosed that she had been sexually assaulted during her journey to the United States and had become pregnant as a result. However, because she was already 9 weeks pregnant, she would not be able to obtain an abortion in Texas, as it was past the detection of a fetal heartbeat.

Dr. Dickman also noted that there were virtually no exceptions for rape or incest in Texas at that time, and even if a rape exception had been a possibility for his patient, the steps she would have had to take to meet the exception, including reporting the assault to law enforcement, would not have been an option for her.⁸² For undocumented individuals, a voluntary interaction with law enforcement is not, and never would be, on the table.⁸³ Dr. Dickman recounted that he told her that her only option would be to travel to New Mexico for care, and she immediately expressed how difficult traveling would be due to her undocumented status.⁸⁴ The risk of deportation would be too high, she said.⁸⁵

Dr. Dickman does not know what happened to the woman after that day, and only hopes she was able to somehow find the care she needed after an incredibly traumatic journey to the United States.⁸⁶ However, he admitted that the odds were stacked against her.⁸⁷ Although I will never know this woman's name or the outcome of her story, Dr. Dickman's first-hand account adds a layer of humanity to the research, anecdotes, and data detailed thus far. The intersectional way that immigration status, gender-based violence, healthcare access, and socioeconomic

81. Video Conference Interview with Samuel L. Dickman, Chief Medical Officer of Planned Parenthood of Montana (Mar. 22, 2024). This section is informed by insights and observations gathered during my interview with Dr. Dickman, and supplemented by my personal notes from the conversation.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

status all compound render the choices of undocumented pregnant people, even prior to *Dobbs*, essentially non-existent.

C. IMMIGRANT ACCESS TO ABORTION POST-*DOBBS*

When the Supreme Court overturned *Roe v. Wade* in its unprecedented *Dobbs* decision in 2022,⁸⁸ the situation for undocumented individuals in states with abortion restrictions went from bad to worse. Thirteen states had “trigger laws” on the books, designed to take effect as soon as *Roe* was overturned, while many other states were poised to take action immediately to restrict abortion access within their borders once the procedure was no longer a constitutional guarantee—and they did.⁸⁹ Already hostile reproductive rights landscapes in states like Florida and Texas, both with high immigrant populations,⁹⁰ were made even worse by the Supreme Court’s stripping of the constitutional right to abortion. Additionally, both Florida and Texas have nearly 70,000 pending asylum cases each,⁹¹ highlighting the sheer number of asylum-seeking women and individuals whose right to bodily autonomy has been impacted by the *Dobbs* decision.

To make matters worse, many people seeking refuge and asylum are survivors of gender based violence and sexual abuse—abuse they sometimes incur during their journey to the U.S.⁹² Consequently, it is not uncommon for pregnancies to result from such violence.⁹³ Immigrants who made the courageous and dangerous decision to travel hundreds of miles to a foreign country in hopes of a safer future now face the reality that, in some cases, they may have actually had greater bodily autonomy and reproductive choices before they left home.⁹⁴

88. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

89. Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, GUTTMACHER INST. (June 6, 2022), <https://perma.cc/T5PQ-Xwww>.

90. Ali Juell, *New Study: Texas’ Undocumented Immigrant Population Remained Relatively Stable in 2021*, TEXAS TRIBUNE (Nov. 1, 2023), <https://perma.cc/DDV9-6GLN>; *Immigrants in Florida*, AM. IMMIGR. COUNCIL, (Aug. 6, 2020), <https://perma.cc/V4WZ-A9W2>.

91. Ryan Huynh, *Dobbs Restricts Access To Abortion Services For Asylum Seekers, Represses Reproductive Rights*, HUM. RTS. FIRST, (Aug. 18, 2022), <https://Perma.Cc/Xy53-33ls>.

92. See Nicole G. Aguirre, Andrew R. Milewski, Joseph Shin, & Deborah Ottenheimer, *Gender-Based Violence Experienced by Women Seeking Asylum in the United State: A Lifetime of Multiple Traumas Inflicted by Multiple Perpetrators*, 72 J. OF FORENSIC & LEGAL MED. 1 (2020); see also Bekah McNeel, *Texas Abortion Law Complicates San Antonio Group’s Mission to Help Undocumented Immigrants—Even Those Raped En Route to the U.S.*, TEXAS TRIBUNE (Nov. 12, 2021), <https://perma.cc/QV4Z-CWRC> (“[i]t’s sexual violence that leads many to flee in the first place, but for them and others, the journey to safety is anything but safe.”). This Texas Tribune article also notes that “In a May 2017 report, Médecins Sans Frontières/Doctors Without Borders surveyed patients at the clinics it supports throughout Mexico. One-third of the women surveyed had been sexually abused on their journey from Central America, and of the 166 sexual abuse survivors surveyed, 60 percent had been raped.” *Id.*

93. See Video Conference Interview with Samuel L. Dickman, Chief Medical Officer of Planned Parenthood of Montana (Mar. 22, 2024), <https://perma.cc/VEE9-QM9Y>.

94. See Fabiola Sánchez & Megan Janetsky, *Mexico Decriminalizes Abortion, Extending Latin American Trend of Widening Access to Procedure*, ASSOC. PRESS (Sept. 6, 2023), <https://perma.cc/X6YB-5WFM>; For an interesting discussion about Americans seeking abortion care in Mexico, see

Like all individuals seeking abortion in states with bans or restrictions, undocumented pregnant people technically have the option to travel out of state for abortion care. However, as highlighted earlier in this Note, the logistical challenges of travel for undocumented people are enormous, and include language barriers⁹⁵ and the risk of detention or deportation if they happen to be stopped at one of the more than 110 interior immigration checkpoints near the southern border.⁹⁶ For example, there are reports of undocumented women in the Rio Grande Valley who are afraid to cross state lines because they fear that the journey will put them at risk of deportation.⁹⁷ They are thus forced to make the difficult decision to either risk their immigration status in search of a legal, safe abortion, or forgo their abortion or otherwise manage it via an unlicensed procedure in Texas.⁹⁸

Additionally, “for the roughly 240,000 people awaiting their court hearings who are enrolled in [ICE’s] Intensive Supervision Appearance Program, a smart-phone app or a GPS ankle shackle tracks their movements and can be used to restrict out-of-state travel.”⁹⁹ This method of hyper surveillance, often used even when the individual has no criminal history and is not a flight risk, makes reproductive care impossible for undocumented people in states with abortion bans like Texas. Moreover, growing discussions about criminalizing abortion further complicates options for undocumented people who can become pregnant. As the Center for Gender and Refugee Studies has noted, allowing states to criminalize abortion “will inflict a particularly heavy burden on undocumented immigrants,

Scott Simon, *Americans in Border States are Traveling to Mexico for Abortion Medication*, NAT’L PUB. RADIO (July 9, 2022), <https://perma.cc/G9PB-2776>.

95. Amanda Su, *Challenges Increase for Immigrants Accessing Abortion after Roe Reversal*, ABC NEWS (July 17, 2022), <https://perma.cc/KVS2-NTJW> (“Organizers and physicians say barriers to accessing abortions—an already convoluted process in a post-Roe world—are exacerbated by limited English proficiency and immigration status, which may hinder or completely bar immigrants from traveling across state lines, leaving them to slip through the cracks.”).

96. See Huynh, *supra* note 91; see also *Border Patrol Lacks Important Information about Immigration Checkpoints Within the United States*, GOV’T ACCOUNTABILITY OFFICE (June 29, 2022), <https://perma.cc/WE8K-VAMP>.

97. Mary Giovagnoli, *Overturning Roe Creates More Barriers For Asylum-Seekers And Immigrants*, MS. MAGAZINE (May 24, 2022), <https://perma.Cc/F3hp-Fmmj>. Even before *Roe* was overturned, “close to 1,200 women have been arrested under various state laws criminalizing abortion or other maternal behavior.” *Id.*

98. See *id.*

99. See Huynh, *supra* note 91; see also Johana Bhuiyan, ‘Constantly afraid’: Immigrants on Life Under the US Government’s Eye, THE GUARDIAN (Mar. 8, 2022), <https://perma.cc/SYL2-TGQX> (telling the story of Macarena, an undocumented woman who was subjected to the Intensive Supervision Appearance Program (Isap), and noting that “[i]mmigrants in the program are electronically surveilled through an ankle monitor, voice recognition or the company’s proprietary tracking app until their court date, and meet regularly with a case manager. Holding an exclusive, \$2.2bn five-year contract to run Isap for Ice is BI, a company that got its start in monitoring cattle and is owned by one of the country’s largest private prison corporations, the Geo Group.”). For a deeper dive into the questionable ethics of BI Inc, see Johana Bhuiyan, *Poor Tech, Opaque Rules, Exhausted Staff: Inside the Private Company Surveilling US Immigrants*, THE GUARDIAN (Mar. 7, 2022), <https://perma.cc/STX3-2HWT>.

for whom contact with the criminal justice system can lead to detention, deportation, and permanent family separation.”¹⁰⁰

The legal landscape for undocumented people in states like Florida and Texas was grim even before *Dobbs*, thanks to a wave of anti-immigrant, racist, evangelical ideology emboldened by the Trump Administration. Mistreatment and exploitation of undocumented individuals at the border, particularly people who can become pregnant and children, was disguised as smart immigration policy and was normalized and even celebrated. Simultaneously, anti-abortion groups organized around the clock, ultimately realizing their goal of overturning *Roe* with the help of Donald Trump’s three conservative appointments to the Supreme Court. Stacked on top of each other like building blocks, the weight of these relatively swift changes to immigration policy and abortion access, starting with laws like SB8, the federal “zero tolerance” policy, and culminating in the *Dobbs* decision, continue to be felt most deeply by undocumented people in southern states where abortion access is now almost non-existent.

Undocumented individuals’ inability to travel across state lines to receive abortion care in less hostile states means that people in states with bans face wildly different reproductive choices and outcomes compared to immigrants who enter or reside in states with greater access. These disparate results, felt specifically by undocumented people compared to their legal resident counterparts who are free to travel across state lines, violates the Equal Protection Clause. Fear of criminal punishment, deportation, and detainment debilitates undocumented people, many of whom are already survivors of abuse, forcing them to make life altering, unimaginably difficult choices about their bodies—that is, if they even have any available choices at all.

III. DENYING UNDOCUMENTED PEOPLE ACCESS TO ABORTION VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The Equal Protection Clause of the Fourteenth Amendment says no state shall “deny to any person within its jurisdiction the equal protection of the laws.”¹⁰¹ While states are allowed to make certain classifications among similarly situated individuals, they cannot do so in a way that arbitrarily burdens a specific group.¹⁰² Furthermore, the Equal Protection clause is not limited to citizens of the United States, and applies equally to undocumented immigrants.¹⁰³ Parts I and II provided

100. *CGRS Denounces SCOTUS Decision Overturning Roe v. Wade*, CTR. FOR GENDER AND REFUGEE STUD. (June 24, 2022), <https://perma.cc/QKE5-J75J>.

101. U.S. CONST. Amend. XIV, §1. (“... nor shall any state deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.”) (emphasis added).

102. *Equal protection*, LEGAL INFORMATION INSTITUTE, <https://perma.cc/238Y-QCG2>.

103. *Id.* (“The Equal Protection Clause is not limited to citizens. Its guarantees extend to immigrants or aliens. A group of aliens need not be identical or even virtually identical to citizens to be fully protected by the Equal Protection Clause; indeed, citizens and aliens may be sufficiently similar merely because they are both lawful residents.”).

detailed accounts, statistics, and case law identifying the unique ways in which undocumented people, particularly at the southern border, have been systematically targeted, oppressed, abused, and unduly burdened in their pursuit of reproductive rights and healthcare within the United States. This Part uses a constitutional framework to examine these disparities, arguing that the disparate outcomes experienced by undocumented people in need of abortion care across states violates the Equal Protection Clause of the Fourteenth Amendment.

To begin, imagine that there are two women traveling to the United States from Mexico. Their names are Flora and Iris. Both women have been sexually assaulted during their journey,¹⁰⁴ and both find themselves pregnant within a few weeks of entering the United States. Both have valid asylum claims based on a fear of persecution, but have not affirmatively turned themselves into border patrol officers because they fear immediate deportation.¹⁰⁵ The only difference between Flora and Iris is that Flora crossed the border into California while Iris crossed the border into Texas. Because California offers health insurance for all

104. For a firsthand account of a woman experiencing assault during her immigration journey, see Video Conference Interview with Samuel L. Dickman, *supra* note 81.

105. See *Executive Office For Immigration Review Adjudication Statistics*, DEP'T OF JUST. (2023), <https://perma.cc/GH25-P496> (highlighting low rates of successful asylum claims for women from Central and South America). To be granted asylum in the United States, one has to meet the legal definition of "refugee," which is stated in the Immigration and Nationality Act as: "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . ." See 8 U.S.C. § 1101.42. Additionally, post-*Dobbs*, pregnant people who previously could qualify for "abortion asylum" are no longer offered such protection in the United States. See Madelyn Cox-Guerra, *Abortion Asylees: Is There Still a Path Forward After Dobbs?*, 40 MINN. J. OF LAW & INEQUALITY ONLINE 1 (Oct. 30, 2022). For a discussion on the omission of "gender" as a protected class under the refugee definition and the implications of such omission, see Allison W. Reimann, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1201–02 (2009) ("[i]n principle, women are eligible to receive asylum within this framework to the same extent as men. However, a number of obstacles have confronted women who seek asylum from gender-based harm. Most prominently, gender is not one of the characteristics included in the asylum statute as expressly warranting protection. Thus, applicants for asylum fleeing gender-based harm are forced to characterize their claims to fit into one of the five recognized categories—most often membership in a particular social group. Because of pervasive attitudes among United States decision makers that gender alone cannot constitute a particular social group—largely out of fear that such an allowance would make half of a country's population eligible for asylum—applicants have felt constrained to describe their claims in terms of extremely narrow subsets of women. Gender alone, however, is often the single factor linking the persecution to the protected ground, both motivating the persecutor to harm the victim and accounting for the failure of the victim's state to adequately protect her. Thus, these applicants face the paradox of defining their particular social group very narrowly only to render nearly impossible their ability to establish the required causal nexus between the persecution and their narrowly defined particular social group."). But see Deborah Anker, Lauren Gilbert, & Nancy Kelly, *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709 (1997).

undocumented individuals,¹⁰⁶ Flora can easily, and without fear of deportation, afford and obtain an appointment with a medical professional to talk through her pregnancy options. She is then able to receive a safe abortion the following week. Iris, on the other hand, cannot receive health insurance as an undocumented person in Texas,¹⁰⁷ and cannot travel to an abortion clinic within the state because they are no longer operational post-*Dobbs*.¹⁰⁸ She also cannot travel out of state for an abortion because she fears being detected by enforcement officers, nor does she have a car, documentation, English proficiency, or money for travel. With no options, Iris continues with her pregnancy and eventually gives birth.

Flora and Iris entered the United States with identical backgrounds, and yet their experiences after crossing the border were vastly different. It's hard to imagine that such drastic, arbitrary differences in outcomes was ever an intended or acceptable consequence of immigration policy. And yes, while it is true that all individuals have different outcomes and experiences based on the laws of their state, most legal residents, at least on paper, are able to move to a new state if they feel the state they currently live in is not serving their particular interests or values. Undocumented immigrants generally do not have the same available choices, creating an identifiable Equal Protection violation that demands intervention to ensure women like Flora and Iris have similar options for abortion care no matter where they enter the country and regardless of immigration status. The restrictive abortion laws of Texas, Georgia, and other states unduly and arbitrarily burden undocumented people who can become pregnant.

That the federal government has plenary jurisdiction over immigration law and foreign policy is a well-known and widely accepted fact that has been reaffirmed by the Supreme Court repeatedly.¹⁰⁹ Still, there has been a noticeable increase in

106. See Mary Kekatos, *California Becomes First State to Offer Health Insurance to All Undocumented Immigrants*, ABC NEWS (Dec. 29, 2023), <https://perma.cc/2XDD-3HKX>.

107. D-8600, Non-Qualified Aliens, TEXAS HEALTH AND HUM. SERV.'S, <https://perma.cc/FRT6-5ZQF>.

108. Erin Douglas & Eleanor Klibanoff, *Abortions In Texas Have Stopped After Attorney General Ken Paxton Said Pre-Roe Bans Could Be In Effect, Clinics Say*, TEXAS TRIBUNE (June 24, 2022), <https://perma.cc/98tg-7fa3>; *Abortion Access in Texas*, PLANNED PARENTHOOD OF GREATER TEXAS, INC., <https://perma.cc/N7UE-A6AZ> (noting that "[a]bortion services are currently not available at Planned Parenthood of Greater Texas health centers, and may be impacted in other states").

109. See *ArtI.S8.C18.8.1 Overview of Congress's Immigration Powers*, CONST. ANNOTATED, n.1, <https://perma.cc/V8MU-BMYC> (citing *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) ("The Court without exception has sustained Congress's 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'") (quoting *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 123 (1967)); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 343 (1909) (noting the plenary power of Congress as to the admission of aliens and the complete and absolute power of Congress over the subject of immigration); see also *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.")).

the role of state and local government in immigration policy,¹¹⁰ likely due in large part to an incredibly large influx of immigrants over the last 60 years.¹¹¹ This increase has led many states, particularly at the southern border, to introduce their own, state-wide policies aimed to manage, support, protect, or further marginalize their immigrant populations, depending on the state. Historically, however, state law attempts to implement restrictive immigration policies have been met with judicial resistance and invalidation.¹¹²

For example, in *Plyler v. Doe*, a class action lawsuit was brought by Mexican schoolchildren in Texas who could not prove legal entry into the United States and were subsequently denied access to the Texas public school system.¹¹³ The Supreme Court ultimately deemed such action unconstitutional and an overreach of state power.¹¹⁴ It held that denying undocumented children access to an education violates the Equal Protection Clause of the Fourteenth Amendment, and invalidated the state law.¹¹⁵ Similarly, in *Graham v. Richardson*, the Supreme Court held an Arizona law that attempted to limit undocumented immigrants' access to welfare benefits was an unconstitutional violation of the Equal Protection Clause.¹¹⁶

Unlike in *Plyler*, however, where the state of Texas was treating undocumented children differently from their legal resident counterparts based solely on immigration status in violation of the Equal Protection Clause, a state law Equal Protection challenge will likely be unsuccessful in the state abortion ban context. Because Texas and other states with abortion bans restrict the procedure for *all* individuals, not just for undocumented pregnant individuals, they are not technically treating similarly situated individuals differently with these bans because the abortion ban is one of general applicability. Still, for reasons discussed in Parts I and II, it is abundantly clear that undocumented individuals *do* face unique barriers and undue burdens when it comes to abortion access. Not only are they far less likely to be able to travel out of state to receive care, but they are also

110. See Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008) (noting "there is a veritable deluge of state and local legislation seeking to regulate noncitizens" and that "In 2006, immigration was the subject of at least 540 bills in twenty-seven states.").

111. See Joel Rose, *The immigrant population in the U.S. is climbing again, setting a record last year*, NAT'L PUB. RADIO (Sept. 14, 2023), <https://perma.cc/QS4M-6AEV>; *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065*, PEW RSCH. CTR. (Sept. 28, 2023), <https://perma.cc/7HCB-GP9H>.

112. See Sejal Jota, *Do State and Local Immigration Laws Violate Federal Law?*, POPULAR GOV., n.5 (2009), <https://perma.cc/M5C3-VMVG> ("The U.S. Supreme Court has previously struck down state laws relating to immigrants on one or more of these preemption grounds. See, e.g., *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (invalidating state denial of resident tuition benefits to certain visa holders); *Graham v. Richardson*, 403 U.S. 365, 377–80 (1971) (invalidating state welfare restriction); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418–20 (1948) (invalidating state denial of commercial fishing licenses); *Hines v. Davidowitz*, 312 U.S. 52, 62–68 (1941) (invalidating state alien-registration scheme).").

113. *Plyler v. Doe*, 457 U.S. 202, 225 (1982).

114. *Id.* For a deeper analysis of the impact and ramifications of the *Plyler* decision, see Martha M. McCarthy, *Plyler v. Doe: Issues and Implications*, 7 ED. LAW REP. 235 (1983).

115. *Id.*

116. *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

systematically excluded from the (minimal) recognized abortion exceptions for cases of rape, incest, or maternal health. Thus, undocumented women in Texas are situated fundamentally differently than other Texans with the capacity to get pregnant and other undocumented immigrants who have sought refuge in states without abortion bans, such as California.

Because of this, the Equal Protection Clause, as applied to the federal government through reverse incorporation of the Fifth Amendment Due Process Clause,¹¹⁷ requires the U.S. government to address such disparities and burdens for undocumented people in states with abortion bans, or alternatively implores legal advocates, on behalf of a group of impacted undocumented people who can become pregnant, to file a class action lawsuit similar to that filed in *Plyler*. To ignore such clear Equal Protection violations would be to decide that undocumented individuals, because of sheer unfortunate geographical luck, are unable to obtain abortion care simply because their path to the United States took them through Texas or Georgia instead of California. Travel restrictions and barriers that make accessing reproductive care across and within state lines nearly impossible for undocumented individuals with the capacity to get pregnant discriminate on the basis of both sex and national origin, and lead to two very different outcomes for individuals seeking care in states with and without abortion restrictions. Such arbitrary and disparate outcomes cannot be constitutionally valid.

No matter one's stance on *Dobbs*, it is now the law of the land, and it is unlikely that the constitutional right to an abortion will be restored any time soon. It is similarly unlikely that Texas, a historically conservative state with a long-standing state-wide anti-abortion stance will legalize abortion within the state.¹¹⁸ Thus, for the hundreds of thousands of undocumented immigrants living in Texas and other states with abortion restrictions, accessible travel and recognized exceptions to state-wide abortion bans are protections necessary for preserving the full humanity and bodily autonomy of undocumented individuals. The difference in outcomes for pregnant undocumented individuals in need of abortion care in California compared to Texas demands federal intervention because the results disproportionately burden undocumented individuals who can become pregnant in abortion-restrictive states. Undocumented individuals who cross the border into the United States are not seeking refuge in Texas specifically, nor are they seeking "Texas asylum." They are seeking protection and refuge in the United States generally, and thus should not be subject to harsh travel restrictions and inconsistent state laws that unconstitutionally prohibit their ability to receive comprehensive medical and reproductive care.

117. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (stating that "[i]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government").

118. See Eleanor Klibanoff, *Not 1925: Texas' Law Banning Abortion Dates to Before the Civil War*, TEXAS TRIBUNE (Aug. 17, 2022), <https://perma.cc/2FTV-V9N4>.

To avoid clear Equal Protection violations, the federal government must invoke its plenary power over immigration to ensure pregnant undocumented individuals, no matter what state they reside in, have access to care either within their home state, or through accessible transportation options. Such legislation would allow undocumented individuals who can become pregnant to travel out of state to receive care without fear of being detained at border security checkpoints and would also protect those who qualify for recognized abortion ban exceptions such as rape from fearing deportation should they report their assault to law enforcement. The Supreme Court has emphatically held that:

[P]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly [e]mbedded in the legislative and judicial tissues of our body politic as any aspect of our government.¹¹⁹

Undocumented immigrants' access to medical care generally and abortion care specifically falls squarely under the umbrella of "policies pertaining to the entry of aliens and their right to remain here"¹²⁰ and should be treated as such, with the federal government working to ensure pregnant undocumented people have equal access to abortion care either within or nearby their respective states, free from undue burden. Amid clear evidence that undocumented people who can become pregnant experience disparate reproductive health outcomes as compared to U.S. citizens or legal permanent residents who can become pregnant in violation of the Equal Protection Clause, Part IV offers several policy recommendations to ensure reproductive care is safe and accessible for undocumented people who can become pregnant.

IV. POLICY RECOMMENDATIONS TO SAFEGUARD UNDOCUMENTED INDIVIDUALS' ACCESS TO ABORTION

There are several possible avenues to remedy the clear Equal Protection violation experienced by undocumented people seeking abortion care. Part A suggests the federal government implement safeguards demanded in a 2022 letter to the Secretary of Homeland Security after *Roe* was overturned, including unfettered access to travel between states. Part B demands greater access to state and federal Medicaid programs for undocumented immigrants. Finally, Part C calls for limitations on the criminalization, detainment, and deportation of undocumented individuals seeking reproductive care as they travel across state lines or utilize state-recognized abortion exceptions.

119. *Galvan v. Press*, 347 U.S. 522, 530 (1954).

120. *Id.*

A. ADHERING TO DEMANDS MADE IN 2022 LETTER TO DHS SECRETARY

To avoid Equal Protection concerns, safeguards must be in place to guarantee unfettered abortion access for undocumented people in *all* states. In 2022, days after *Roe* was overturned, more than 150 organizations wrote a letter to the Secretary of DHS making several demands to ensure access to abortion was not obstructed for immigrants.¹²¹ These demands accurately portray many of the concerns articulated throughout this Note, and call on DHS to take action to ensure undocumented people have access to reproductive care free from fear of deportation or arrest. Specifically, the letter urges DHS to issue clear guidance specifying that it will not use abortion-care related arrests or convictions as a basis for any immigration enforcement action or as a basis for denying immigration relief.¹²² The letter also demands DHS ensure all people held in custody have full access to reproductive care, even in states with bans.¹²³ Finally, and most significantly, the letter calls for DHS's guarantee that they will not interfere with people's ability to travel across state lines for care, regardless of immigration status.¹²⁴

Ensuring that undocumented people have full and complete access to travel for abortion care without fear of arrest or detainment is the single most important step the U.S. government must take to avoid Equal Protection violations. Undocumented people do not have the same ability to migrate when the state they seek refuge in does not have social or medical policies that serve their needs. A person who enters and finds themselves pregnant in Texas is unable to simply flee to New Mexico or California for abortion care because the threat of being apprehended at one of the many immigration checkpoints near the southern border is too great.¹²⁵ And although similarly situated legal residents may have any number of barriers to traveling for abortion care or uprooting their lives to take up residence in a more progressive state, the option is still there, and the barriers, while high, are logistical in nature, not legal, which makes an enormous difference when analyzing available options. For undocumented pregnant people in states with abortion bans, the option to travel out of state is not an option at all—the crux of the Equal Protection violation at issue. In order to constitutionally protect all similarly situated undocumented pregnant people, the federal government must issue guidance demanding unfettered, accessible, and safe access to travel between all states, with directives to avoid detainment and arrest under all circumstances.

The demands in this letter are not radical. On the contrary, this letter articulates well-documented concerns shared by undocumented communities seeking reproductive care and ways the federal government can mitigate the harm exacerbated by the *Dobbs* decision. Given the history of abuse at the border, the Trump

121. Letter to Secretary Mayorkas from 152 Organizations, U.S. Department of Homeland Security (July 19, 2022), <https://perma.cc/37ND-HLC5>.

122. *Id.*

123. *Id.*

124. *Id.*

125. See *supra* Part II.C. and accompanying text.

Administration's role in driving anti-immigrant rhetoric, and the massive implications of *Dobbs*, barriers to abortion care for undocumented pregnant people have never been higher and urgent action has never been more needed. Meeting these demands is a necessary first step in protecting undocumented pregnant people from arbitrary health outcomes based on the state in which they reside. To do anything but adhere to these reasonable imperative demands is to deny undocumented people Equal Protection under the law to which they are entitled.

B. ENSURING GREATER ACCESS TO COMPREHENSIVE MEDICAL CARE

To expand on the second demand of the DHS letter summarized above, providing undocumented individuals with access to medical care, specifically reproductive care, in their home state is instrumental in ensuring that undocumented pregnant people receive comprehensive reproductive care regardless of the state in which they live. Undocumented individuals, who have often fled violent, abusive circumstances, are already at a higher risk of unwanted pregnancy, sexual assault, human trafficking, and other forms of gender based violence.¹²⁶ Additionally, because they have been displaced and are often living in crisis settings, they are without resources, and family and societal structures on which they normally would rely for support.¹²⁷ Lack of access to medical care and contraception also puts undocumented immigrants at heightened risk of unwanted pregnancy.¹²⁸

All of these statistics indicate an increased need for reliable, safe, affordable, and *local* reproductive healthcare options for undocumented people who can become pregnant. Eliminating the need for undocumented people to travel far distances—potentially exposing them to further trauma, abuse, arrest, or detainment in search of abortion care—will lead to better health outcomes overall, as “safe abortion care is an evidence-based intervention and an important life-saving strategy to reduce the impact of unsafe abortion on maternal death and disability.”¹²⁹ The International Federation of Gynecology and Obstetrics suggests that in order to administer compassionate, trauma-informed medical care for displaced patients such as undocumented women seeking reproductive services, not only should healthcare professionals have the requisite training to provide safe, rights-based care, but context-relevant and evidence-based equipment should be available at all

126. See *Supporting Access to Safe Abortion in Conflict and Humanitarian Settings*, INT'L FED. OF GYNEC. AND OBSTET., <https://perma.cc/N3J9-LSZ6> [hereinafter *Supporting Access to Safe Abortion*]; OLIVIA T. RUIZ MARRUJO, HUMAN RIGHTS ALONG THE U.S.–MEXICO BORDER 31 (Kathleen Staudt, Tony Payan, & Z. Anthony Kruszewski eds., 2009) (“Along the U.S.–Mexico and Mexico–Guatemala borders, sexual violence has become of fact of life for migrant women.”).

127. See *Supporting Access to Safe Abortion*, *supra* note 126.

128. *Id.*

129. *Id.* (“Access is a fundamental human right and time sensitive essential health care. Safe abortion is considered part of a comprehensive package of essential sexual, reproductive and maternal health interventions by key health agencies and organizations, including the World Health Organization (WHO), the United Nations (UN) and the Inter-Agency Working Group on Reproductive Health in Crises (IAWG).”).

times.¹³⁰ Relevant government agencies and stakeholders should take a medical-based approach to educate, train, and support health care professionals so that such care is provided reliably and consistently, regardless of what abortion laws that state has on the books.¹³¹ To provide anything but this type of care would put thousands of undocumented people at risk each year.

On top of providing local healthcare professionals with adequate training, equipment, and education to address the “deficit of attention and evidence on abortion services in humanitarian settings,”¹³² the federal government must expand programs like Medicaid to include undocumented immigrants and address the lengthy waiting period (currently five years) for eligible individuals.¹³³ Importantly, under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, federal Medicaid dollars are not currently available for undocumented people who are not legal permanent residents of the United States, with the exception of emergency services.¹³⁴ However, Representatives Pramila Jayapal and Nanette Barragan, and Senator Cory Booker reintroduced the Health Equity and Access Under Law (“HEAL”) for Immigrant Families Act of 2023 in July of that year, which would expand aspects of the federal Medicaid program to undocumented individuals, including giving them access to marketplace insurance plans from which they have been historically excluded.¹³⁵ Even for lawful immigrants, incredibly long wait times and limitations on access to programs like Medicaid, the Children’s Health Insurance Program (“CHIP”), Temporary Assistance for Needy Families (“TANF”) grants, Supplemental Security Income (“SSI”), and certain nutrition and housing programs severely limit available medical options for individuals, and prevent even lawfully present pregnant people from receiving a full range of health services to help manage their pregnancies.¹³⁶

Some states, like California, have recently begun offering health insurance for undocumented immigrants of all ages through their Medi-Cal program.¹³⁷ Health insurance programs like that in California show encouraging progress for the future of comprehensive health coverage for undocumented pregnant people, but also further highlight the disparities between undocumented immigrants in California as compared to those in Texas. Standardizing comprehensive state and federal healthcare coverage for undocumented immigrants by expanding Medicaid access for undocumented individuals and encouraging states to adopt healthcare plans that model Medi-Cal will help equalize reproductive health outcomes for undocumented

130. *Id.*

131. *Id.*

132. *Id.*

133. *Abortion Justice for Immigrants*, ALLABOVEALL, <https://perma.cc/VFSS-47ZX>; *Support and Pass the LIFT the BAR Act*, NAT’L IMMIG. LAW CTR (Aug. 2021), <https://perma.cc/5DUE-C9YQ>.

134. Madeline Morcelle, *How the HEAL for Immigrant Families Act Could Foster Reproductive Health Equity and Justice*, NAT’L HEALTH LAW PROGRAM (July 27, 2023), <https://perma.cc/2SGE-QM5A>.

135. *Id.*

136. H.R. 5227, 117th Cong. (2021–2022).

137. See Kekatos, *supra* note 106.

individuals across the nation¹³⁸—a crucial step in remedying the flagrant Equal Protection concerns that arise from disparate access to reproductive care among states.

C. PROHIBITING DETAINMENT AND ARREST OF UNDOCUMENTED PREGNANT INDIVIDUALS

In addition to providing undocumented individuals with quality, local abortion care, ICE should be instructed by *every* presidential administration to refrain from detaining or arresting pregnant or postpartum undocumented people, no matter the circumstance. Although the Biden Administration reversed the Trump-era rule that allowed for such detainment and is now, on paper, following the Obama-era rule that calls for detaining pregnant individuals only in “extraordinary circumstances,”¹³⁹ pregnant individuals are still being detained.¹⁴⁰ There are no “extraordinary circumstances”¹⁴¹ that warrant placing a person in detention while they are pregnant or postpartum and removing their autonomy over where they go, how they manage their pregnancy, and from whom they receive medical care. Not only are conditions in detention centers often horrendous and unsafe generally,¹⁴² but the medical care in these facilities has a history of being inadequate and dangerous for pregnant individuals.¹⁴³ In order to remedy these egregious failures at the border and ensure undocumented people in every state enjoy equal protection under the law, ICE must be prohibited from detaining and arresting pregnant and postpartum individuals and preventing them from

138. See Julianne Zuber, *Healthcare for the Undocumented: Solving A Public Health Crisis in the U.S.*, 28 J. CONTEMP. HEALTH L. & POL’Y 350, 352 (2012) (examining “how . . . federal health care legislation . . . has left undocumented immigrants without reasonable access to health care while continuing to place an extreme financial burden on federal, state, and local taxpayers” and identifying “both current and potential financial, social, and public health challenges that could arise if undocumented immigrants continue to be denied health care, or are confronted with substantial barriers to its access”).

139. See Sullivan, *supra* note 33.

140. See Del Rey, *supra* note 34.

141. See Sullivan, *supra* note 33.

142. Warsi, *supra* note 44; Barajas, *supra* note 44; HUM. RTS. WATCH, *supra* note 44; *U.S.: New Report Shines Spotlight on Abuses and Growth in Immigrant Detention Under Trump*, HUM. RTS. WATCH (Apr. 30, 2020), <https://perma.cc/2D8D-5JDV>; *How Detention Centers Affect the Health of Immigrant Children: A Research Roundup*, JOURNALIST’S RESOURCE (July 22, 2019), <https://perma.cc/53PT-TERX>; *Southern Border: Conditions at Immigrant Detention Centers*, AM. MED. ASS’N, <https://perma.cc/KH5Z-YQ55>.

143. Natalia Megas, *ICE Jailed Pregnant Woman and Could’ve Killed Her Unborn Child*, THE DAILY BEAST (Jan. 30, 2019), <https://perma.cc/7P7L-YR7G>. See also Natalie Avery Barnaby, *Pregnant and Detained: Constitutional Rights and Remedies for Pregnant Immigrant Detainees*, 111 J. CRIM. L. & CRIMINOLOGY 531 (2021) (“[H]olding pregnant women in detention comes at a high cost. Not only do pregnant women experience emotional and mental stress while in detention, but the risk of miscarrying or other harm to their fetuses increases. Because pregnant detainees have no alternatives for care, detention facilities are constitutionally required to provide them with adequate healthcare. However, for many immigrants this constitutional guarantee bestows a right with no mechanism for enforcement.”).

accessing abortion care. This remains true, and potentially even more urgent, for pregnant unaccompanied minors in ORR care.¹⁴⁴

Prohibitions on arrest and detainment of undocumented people should also extend to law enforcement officers who manage the reporting process for sexual assaults. Most states with abortion bans have limited abortion exceptions for rape and incest (although in practice, these exceptions are rarely ever granted).¹⁴⁵ For undocumented people who can become pregnant, reporting an assault to law enforcement means almost certain detection and potential deportation. Yet, to meet the limited rape and incest exceptions put in place by states with restrictive abortion bans, the victim must report the rape to law enforcement to even be considered for an exception.¹⁴⁶ This is not a feasible option for most undocumented individuals, leaving them with no remedy for pregnancies that result from rape—a trauma that many people experience during their journey into the United States.¹⁴⁷ State and federal law enforcement must refrain from arresting any person due to immigration status who reports a sexual assault in order to qualify for the rape exception to a state-wide abortion ban. Allowing undocumented people to utilize these, albeit limited, exceptions is a necessary step in ensuring undocumented people seeking abortion care receive equal protection under the law.

CONCLUSION

A history of abusive immigration policies and practices, exacerbated by the Trump Administration and its hateful anti-immigrant rhetoric, laid the groundwork for immense barriers and challenges for undocumented people seeking abortion care, even prior to *Dobbs*. When *Roe v. Wade* was overturned in 2022, many conservative states immediately banned the procedure, all but eliminating any hope of reproductive care for undocumented people in restrictive states who

144. Chelsea Tejada, *Biden Administration Issues Policy Protecting Access to Abortion for Unaccompanied Immigrant Youth*, AM. C.L. UNION (Nov. 21, 2022), <https://perma.cc/DD2H-UPMH> (“[a]bortion bans not only prohibit access to abortion itself, but also may affect miscarriage care or emergency care that a pregnant minor may need.”). The Biden Administration must also “strengthen its reproductive health care policies for other people in government custody, including the Bureau of Prisons, Immigration and Customs Enforcement, and Customs and Border Protection. Abortion is essential health care, and accessing it should not depend on your immigration status, whether you’re incarcerated, or which state you are in.” *Id.*

145. See Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted*, N.Y. TIMES (Jan. 21, 2023), <https://perma.cc/359H-XFU8>.

146. Samuel Dickman, *As a Rule, Rape Exceptions for Abortion Don’t Work*, STAT (Apr. 9, 2024), <https://perma.cc/3SNY-2JJG> (“To obtain an abortion, survivors of rape are told they first must report the crime to law enforcement. Yet the vast majority of survivors never report being raped — because doing so would put them at greater risk of violence from their abuser, because they don’t trust the police, or because rape is so stigmatized they don’t feel comfortable discussing it.”). Additionally, even if a undocumented survivor were to report their rape to law enforcement, evade deportation, and be granted an exception, there are hardly any facilities or willing doctors to perform abortions in states with harsh abortion laws. *Id.*

147. Bekah McNeel, *Texas Abortion Law Complicates San Antonio Group’s Mission to Help Undocumented Immigrants — Even Those Raped En Route to the U.S.*, TEXAS TRIBUNE (Nov. 12, 2021), <https://perma.cc/QV4Z-CWRC>.

face legal and logistical barriers to traveling out of state for the procedure. Meanwhile, in states like California, also with high immigrant populations but more progressive social assistance programs, undocumented people have access to a wide variety of medical care, including abortions, at a low cost. This Note calls out this disparity as an unconstitutional violation of the Equal Protection Clause—written to ensure equal treatment under state and federal law for those similarly situated, and applicable to undocumented immigrants just as comprehensively as those with legal resident status. In order to remedy such a grievous violation, the federal government must ensure undocumented individuals in all states have access to quality and inclusive medical care, and access to safe, affordable travel if in-state abortion care is not an option.

Additionally, we must put an end to abusive, unethical border practices that put people who can become pregnant and children in danger, including ending detainment for all pregnant individuals, regardless of circumstance, and immediately ceasing criminalization of people seeking abortion care, whether they are attempting to travel across state lines or availing themselves of in-state abortion exceptions. With over 5 million undocumented women living in the United States,¹⁴⁸ we must do better to protect undocumented people, their families, their bodies, and their futures. To ignore this urgent need is to turn a blind eye to flagrant Equal Protection violations. It is high time we *document* the struggles of undocumented individuals with the capacity to get pregnant, tell their stories, and fight for their safe, unfettered, and *equal* access to reproductive care in all states. Our Constitution demands it.

148. See *Profile of the Unauthorized Population: United States*, MIGRATION POL'Y INST., <https://perma.cc/3VTQ-XP9D>.