

**Equal Protection in *Dobbs* and Beyond:**  
**How States Protect Life Inside and Outside of the Abortion Context**

Reva Siegel, Serena Mayeri & Melissa Murray

43 COLUM. J. OF GENDER & THE LAW (forthcoming 2023)

In the leaked draft of *Dobbs v. Jackson Women’s Health Organization*, Justice Samuel Alito dismissed the Equal Protection Clause as an alternative ground of the abortion right, citing an amicus brief in which we advanced that argument. In dicta, Justice Alito claimed that precedents foreclosed the brief’s arguments (pp. 10-11).

Justice Alito did not address a single equal protection case or argument on which the brief relied. Instead, he cited *Geduldig v. Aiello*, a 1974 case decided before the Court extended heightened scrutiny to sex-based state action—a case our brief shows has been superseded by *United States v. Virginia* and *Nevada Department of Human Resources v. Hibbs*. Justice Alito’s claim to address equal protection precedents without discussing any of these decisions suggests an unwillingness to recognize the last half century of sex equality law—a spirit that finds many forms of expression in the opinion’s due process analysis.

This Essay, written before Justice Alito’s draft leaked, explains the brief’s equal protection arguments for abortion rights, and shows how these equality-based arguments open up crucial conversations that extend far beyond abortion.

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Equality challenges to abortion bans preceded *Roe*, and will continue long after *Dobbs v. Jackson Women’s Health Organization*, however the Court rules in that case. In this Essay we discuss our amicus brief in *Dobbs*, demonstrating that Mississippi’s ban on abortions after 15 weeks violates the Fourteenth Amendment’s Equal Protection Clause.

Our brief shows how the canonical equal protection cases *United States v. Virginia* and *Department of Human Resources v. Hibbs* extend to the regulation of pregnancy, providing an independent constitutional basis for abortion rights. Abortion bans classify by sex. Equal protection requires the government to explain why group-based rather than facially-neutral regulations best serve its ends, especially when the challenged laws perpetuate historic forms of group-based harm. As we show, Mississippi decided to ban abortion, choosing sex-based and coercive means to protect health and life; at the same time the state consistently refused to enact safety-net policies that offered inclusive, noncoercive means to achieve the same health- and life-protective ends.

Our brief asks: Could the state have pursued these same life- and health-protective ends with more inclusive, less coercive strategies? This inquiry has ramifications in courts, in legislatures, and in the court of public opinion. Equal protection focuses the inquiry on how gender, race, and class may distort decisions about protecting life and health, within and outside the abortion context. The equal protection argument can play a role in congressional and executive enforcement of constitutional rights, in the enforcement of equality provisions of state constitutions, and in ongoing debate about proper shape of family life in our constitutional

democracy. Equal protection may also have the power to forge new coalitions as it asks hard questions about the kinds of laws that protect the health and life of future generations and that help families flourish.

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In this Essay we discuss our amicus brief in *Dobbs v. Jackson Women’s Health Organization*<sup>1</sup> demonstrating that Mississippi’s ban on abortions after 15 weeks violates the Fourteenth Amendment’s Equal Protection Clause.<sup>2</sup> Equality challenges to abortion bans preceded *Roe*,<sup>3</sup> continued in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>4</sup> and will survive long after *Dobbs*, however the Court rules in that case. Yet unlike these earlier

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<sup>1</sup> *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021).

<sup>2</sup> See Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondent, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, 2021 WL 4340072 (2021) (the brief is available [here](#)).

<sup>3</sup> In the years before *Roe*, women argued that abortion restrictions violated the Constitution’s liberty and equality guarantees, enforcing double standards in sex and parenting. Litigants challenged abortion bans on equal protection grounds of class and race as well as sex, protesting the bans’ disparate and intersectional health harms. See Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2015, 2044-45 (2021); Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims that Engendered Roe*, 90 B. U. L. REV. 1875, 1889-91 (2010) Nancy Stearns, who played a key role in several of the earliest movement-based challenges to abortion bans, filed an amicus brief in *Roe* that challenged abortion bans on equality grounds. Brief Amicus Curiae on Behalf of New Women Lawyers et al. at 25–33, 33–43, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 134283 (asserting sex equality arguments in sections on equal protection and cruel and unusual punishment). See generally Linda Greenhouse & Reva B. Siegel, *The Unfinished Story of Roe v. Wade* in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 53, 63-65 (Melissa Murray, Kate Shaw & Reva B. Siegel eds. 2019) (describing claims in mass-plaintiff cases at time of *Roe*).

<sup>4</sup> 505 U.S. 833 (1992). Before *Casey*, a growing number of prominent legal scholars expressed the view that the abortion right was also protected by the Constitution’s equality guarantees. See *Casey*, 505 U.S. at 928 & n.4 (Blackmun, J., concurring in part) (observing that the “assumption—that women can simply be forced to accept the ‘natural’ status and incidents of motherhood—appears to rest upon a conception of women’s role that has triggered the protection of the Equal Protection Clause” and citing scholarship); see also Serena Mayeri, *Undue-ing Roe: Constitutional Conflict and Political Polarization in Planned Parenthood v. Casey*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES, *supra* note 3, 137, 150-52 (describing role of sex equality principles in academic and judicial discourse leading up to *Casey*).

arguments, our brief reasons from equal protection cases decided *after Casey*, beginning with the landmark case *United States v. Virginia*.<sup>5</sup>

This application of *Virginia* is new. As late as 2016 the Supreme Court strongly reaffirmed *Roe* and *Casey*,<sup>6</sup> and for that reason, scarcely anyone has had reason to consider how *Virginia* applies to abortion restrictions. Our brief shows that *Virginia* and subsequent equal protection cases apply to laws regulating pregnancy, and that equal protection provides independent grounds for analyzing the constitutionality of abortion restrictions. As Part I of our brief and Part I of this Essay make clear, laws that regulate pregnant woman’s conduct are subject to equal protection scrutiny, just like any other sex-based state action.

Abortion bans expressly target women and require them to continue pregnancy, imposing motherhood over their objections. When the government regulates by sex-based means—as Mississippi and other states do in banning abortion<sup>7</sup>—equal protection doctrine requires the state to show reasons for singling out a group for coercive regulation that do not rely on traditional suspect generalizations about that group.<sup>8</sup>

Mississippi claims its ban on abortion after 15 weeks protects the health of women and the life of the unborn.<sup>9</sup> Our brief subjects these protectionist rationales to “skeptical scrutiny.”<sup>10</sup> Following the Court’s practice in *Virginia*, we examine the state’s reasoning in banning abortion

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<sup>5</sup> 518 U.S. 515 (1996).

<sup>6</sup> See *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582 (2016).

<sup>7</sup> See *infra* notes 51-52 and accompanying text (discussing how abortion bans expressly classify by sex).

<sup>8</sup> See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (holding that government may classify by sex, if the sex-based means are substantially related to important government ends, and government can make this showing without relying on “overbroad generalizations about the different talents, capacities, or preferences of males and females”).

<sup>9</sup> See *infra* text accompanying note 59.

<sup>10</sup> See *id.* at 531 (“Today’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history.”).

in both historical and policy context.<sup>11</sup> The brief considers the intense sex-role stereotyping underpinning the first abortion bans, enacted in the mid-nineteenth century, which makes visible the sex-role stereotypes in the state’s claim that coerced motherhood promotes women’s “health.” And, to show how sex-role stereotypes support the state’s claim that coerced motherhood protects unborn life, the brief locates Mississippi’s choices about abortion in wider policy context. Mississippi decided to ban abortion, choosing sex-based and coercive means to protect life at the same time that the state consistently refused to enact safety-net policies that offered inclusive, noncoercive means to achieve the same life-protective ends. Equal protection analysis asks: Did Mississippi endeavor to protect life by helping those who seek its assistance—either in avoiding pregnancy or in raising families—before singling out for coercion those who violated sex-role stereotypes? Was the state’s choice of means influenced by the race, gender, or poverty of the group the state targeted for regulation?

We apply the brief’s arguments to the facts of *Dobbs*. Yet we wrote the brief with the understanding that its arguments might, in different vernacular, speak to difference audiences in different venues, over time. Equality arguments against abortion restrictions extend beyond *Dobbs*, to other federal cases, to congressional and executive enforcement of constitutional rights, to state governments enforcing state constitutions, and, of course, to ongoing intergenerational debate about the best understanding of our constitutional liberty and equality guarantees.<sup>12</sup>

Equality arguments are engines of critique and of coalition building. Expanding the frame to ask equality questions matters in efforts to litigate and to legislate continuing protections for

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<sup>11</sup> See *infra* note 58 and accompanying text.

<sup>12</sup> See *infra* Part V.

abortion rights. And posing equality questions about abortion can also have effects *outside* the abortion context. An equality frame might strengthen support for policies such as Medicaid expansion and child-care assistance by demonstrating how these acts of social provision—of community and care—change the background conditions in which individuals and families make decisions about whether to carry a pregnancy to term.<sup>13</sup> In short, if one asks what is the point, or the power, or the reach of equality-based constitutional arguments of this kind, one can only answer that question by considering a range of audiences, across settings, and over time.

Part I of this Essay explains how equal protection doctrine on the regulation of pregnancy evolved into the framework announced in *Virginia* and subsequent cases, which provides the doctrinal foundation of our brief. Part II discusses how our brief applies *Virginia*'s framework to Mississippi's ban on abortion after 15 weeks; the section offers a brief account of reasons why abortion bans classify by sex, and how they enforce sex-role stereotypes, analyzed in historical and larger policy contexts. Part III shows how expanding the frame to examine Mississippi's claims about protecting health and life in larger policy context allows a decisionmaker to probe the strength of the state's reasons for employing sex-based coercive means, while rejecting inclusive noncoercive means, to achieve the state's indisputably important ends. Part IV [to come]. Part V concludes by considering applications of the brief's equality arguments in legislative and judicial contexts beyond *Dobbs*.

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<sup>13</sup> Even as opponents of abortion have opposed providing social assistance at levels provided in “blue” states, see Amy Joyce & Lauren Tierney, *What it's like to have a baby in the states most likely to ban abortion*, WASH. POST, May 6, 2022, <https://www.washingtonpost.com/parenting/2022/05/06/support-in-states-banning-abortion/>, there are at least possibilities for purple coalitions around safety net programs, as there have been around pregnant-worker fairness laws. For one current example see Patrick T. Brown, *The Pro-Family Agenda Republicans Should Embrace After Roe*, N.Y. TIMES, May 7, 2022, <https://www.nytimes.com/2022/05/07/opinion/republican-policy-after-ro.html>. Kate Shaw shows how left-right coalitions have come together to secure passage of laws prohibiting discrimination against pregnant workers. See Katherine Shaw, “*Similar in Their Ability or Inability to Work*”: *Young v. UPS and the Meaning of Pregnancy Discrimination in REPRODUCTIVE RIGHTS AND JUSTICE STORIES*, *supra* note 3, at 205, 216-17, 222.

## I. Laws Regulating Pregnant Women Classify By Sex

The Court's decision in *United States v. Virginia* ordering the admission of women to the historically sex-segregated Virginia Military Institute sets out the basic framework in equal protection cases involving sex discrimination.<sup>14</sup> *Virginia* famously affirms the equality of the sexes even as the sexes may differ.<sup>15</sup> We built our brief on an under-appreciated feature of Justice Ginsburg's landmark opinion in *United States v. Virginia*: In discussing varieties of sex-based state action, *Virginia* reasons about laws regulating pregnancy as sex-based state action.<sup>16</sup>

Few have focused on the language in *Virginia* we will discuss, or on questions of questions of equal protection and pregnancy. This is because, for decades, the question has been buried under the substantive due process doctrines regulating abortion (*Casey*<sup>17</sup> is itself rooted in equality values<sup>18</sup>), and under federal statutes that prohibit pregnancy discrimination, including by government actors.<sup>19</sup>

There is of course a 1974 case that famously doubts the possibility that discrimination based on pregnancy is discrimination based on sex, *Geduldig v. Aiello*.<sup>20</sup> *Geduldig* predates the Court's 1976 decision to apply heightened scrutiny to sex-based state action under the Equal

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<sup>14</sup> See *United States v. Virginia*, 518 U.S. 515, 531-34 (1996).

<sup>15</sup> *Id.* (“Inherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.”).

<sup>16</sup> *Id.* See Brief of Equal Protection Scholars at 9; Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 *Geo. L.J.* 167, 204-06 (2020).

<sup>17</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S.833 (1992).

<sup>18</sup> See Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on June Medical*, 2020 *SUP. CT. REV.* 277, \_\_\_.

<sup>19</sup> See Siegel, *supra* note 16, at 210-211 (discussing appellate cases recognizing § 1983 sex-stereotyping claims of pregnancy discrimination under the Equal Protection Clause) See, e.g. *infra* notes (discussing the Pregnancy Discrimination Amendment).

<sup>20</sup> 414 U.S. 484 (1974).

Protection Clause.<sup>21</sup> In what follows we briefly describe the context in which *Geduldig* was decided, and then show how it is superseded by subsequent case law—how, with the development of modern sex discrimination law, the Justices, both liberal and conservative, came to understand and to hold that equal protection prohibited “discrimination against women when they are mothers or mothers-to be.”<sup>22</sup>

In the early 1970s, the Court’s sex discrimination decisions prohibited sex-based state action enforcing traditional sex-role stereotypes, especially the sex-role stereotypes associated with the male breadwinner/female caregiver ideal.<sup>23</sup> Feminist lawyers called upon the Court to analyze laws regulating pregnancy in this same equality framework.<sup>24</sup> But as the Court was just beginning to prohibit practices of sex-role stereotyping, perhaps fearful of too-rapid change, the Court fashioned a carve-out. *Geduldig* held that laws regulating pregnancy were not sex classifications that triggered heightened equal protection scrutiny as other sex-based classifications do.<sup>25</sup> The Court reasoned from the premise that sexual stereotyping stopped where so-called real physical difference began—a practice of reasoning from the body or “physiological naturalism.”<sup>26</sup> When the Court started to extend *Geduldig*’s claims about

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<sup>21</sup> The Court first applied heightened scrutiny in sex discrimination cases in *Craig v. Boren*, 429 U.S. 190 (1976). Scholars in the field are divided about whether *Geduldig* has been superseded. See Siegel, *supra* note **Error! Bookmark not defined.**, at 171-72 (surveying evolving views of scholars in the field).

<sup>22</sup> *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (quoting Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 100 (1986))

<sup>23</sup> See Siegel, *supra* note 1616, at 184, 191-92.

<sup>24</sup> Feminist lawyers argued under the Equal Protection Clause and under the Equal Rights Amendment that laws regulating pregnancy are sex-based state action, deserving heightened (strict) scrutiny and unconstitutional whenever they enforce traditional sex roles or otherwise subordinate the sexes. *Id.* at 183-84, 191-92, 195, 197-98.

<sup>25</sup> *Geduldig v. Aiello*, 417 U.S. 484, 496 n. 20 (1974) (“While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero*. . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics.”)

<sup>26</sup> On physiological naturalism, see *id.* at 189 and n.127; Siegel, *supra* note **Error! Bookmark not defined.**, at 267-68.

pregnancy into federal employment discrimination law, the women’s movement organized and helped enact the Pregnancy Discrimination Act of 1978 (PDA): an amendment to Title VII<sup>27</sup> which recognized that employment practices that discriminate against pregnant persons discriminate on the basis of sex.<sup>28</sup>

As courts acquired decades of experience interpreting the PDA, both liberal and conservative justices came to recognize that pregnant employees **are** subject to sex stereotyping. Twenty-five years after passage of the PDA, the Court held in *Department of Human Resources v. Hibbs*<sup>29</sup> that Congress could enforce the Equal Protection Clause by enacting the family leave provisions of the Family and Medical Leave Act in order to redress stereotyping of pregnant workers.<sup>30</sup> Chief Justice Rehnquist found that Congress’s provision of family leave redressed sex-stereotyping in the provision of maternity leave; many states’ sex-based maternity leave policies were “not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.”<sup>31</sup>

In *Hibbs*, Chief Justice Rehnquist held that the Equal Protection Clause prohibits sex stereotyping of pregnant workers as “discrimination against women when they are mothers or mothers-to be”<sup>32</sup>—and never mentioned *Geduldig*. We have not found a majority opinion invoking *Geduldig* to interpret the Equal Protection Clause since the era of its repudiation by

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<sup>27</sup> Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. §2000e(k) (2018)).

<sup>28</sup> Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2018)).

<sup>29</sup> 538 U.S. 721 (2003).

<sup>30</sup> *Id.* at 736 (quoting Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 100 (1986)) (reporting that Congress determined that restrictions on women’s employment were tied “to the pervasive presumption that women are mothers first, and workers second” and that this “ideology about women’s roles has in turn justified discrimination against women when they are mothers or mothers-to be”).

<sup>31</sup> *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 731 (2003).

<sup>32</sup> *Id.* at 736 (quoting Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 100 (1986))



Congress in the PDA.<sup>33</sup> A growing number of commentators recognize that *Hibbs* has superseded *Geduldig*<sup>34</sup> and holds that unconstitutional sex stereotyping can be directed at women when they are mothers or mothers to be.

We based our brief on Chief Justice Rehnquist’s opinion in *Hibbs*, but even more fundamentally on Justice Ginsburg’s landmark opinion in *United States v. Virginia*—the leading case setting forth the standards for equal protection-sex discrimination claims. It is less widely recognized that *Virginia*, decided just before *Hibbs*, also discussed state regulation of pregnancy. When Justice Ginsburg reviewed forms of sex-based state action, she included a case featuring dispute over laws accommodating pregnancy.<sup>35</sup> This is not accidental. Justice Ginsburg’s opinion focused equality analysis not on the grounds of sameness, but of social status. Differences, the Court explained, “remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”<sup>36</sup>

The *Virginia* majority pointed to a state law about pregnancy—a maternity leave benefit, upheld under the PDA in *California Federal Savings & Loan Association v. Guerra*<sup>37</sup>—as an

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<sup>33</sup> See Siegel, *supra* note 16, at 208 n. 229. A quarter-century ago, Justice Scalia invoked *Geduldig* in a statutory case concerned with proving state of mind of private actors in abortion-clinic protests. See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 274 (1993) (holding that under the civil rights statute 42 U.S.C. § 1985(3), plaintiffs had to prove “invidiously discriminatory animus” such as ill will, and that the goal of preventing abortion “is not the stuff out of which a § 1985(3) ‘invidiously discriminatory animus’ is created”). These are not the questions at issue in questions like *Virginia* or *Hibbs*, when the state has engaged in sex-based state action.

Justice Scalia’s opinion for the Court in *Bray* claims that the Court applied *Geduldig* to its abortion funding decision in *Harris v. McRae*, 448 U.S. 297 (1980). See *Bray*, 506 U.S. at 271–73. That is false. Justice Stewart’s opinion in *McRae*—which he wrote just two years after Congress rejected *Geduldig–Gilbert* reasoning by passing the PDA—never even mentioned the equal protection–sex discrimination line of cases or *Geduldig*, even though the government invoked *Geduldig* as a reason for rational basis. See Brief for the Secretary of Health, Education, & Welfare at 27, *Harris v. McRae*, 448 U.S. 297 (1980) (No. 79-1268), 1980 WL 339637 (“Similarly, the Court has reviewed legislative classifications involving pregnancy in accordance with the rational basis test.” (citing *Geduldig v. Aiello*, 417 U.S. 484, 495–96 (1974))).

<sup>34</sup> See Siegel, *supra* note 16, at 171 n.14.

<sup>35</sup> See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (citing *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 289 (1987)); Brief of Equal Protection Scholars at 9.

<sup>36</sup> *Virginia*, 518 U.S. at 533.

<sup>37</sup> *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 289 (1987).

illustration of a sex-based law that is constitutional because the law promoted rather than restricted equal opportunity. Sex classifications that “promot[e] equal employment opportunity” or “advance [the] full development of the talent and capacities of our Nation’s people”—like the state law establishing unpaid pregnancy disability leave at issue in *Cal. Fed.*—are permissible.<sup>38</sup> But the Court in *Virginia* held that the Constitution’s guarantee of equal protection means that sex “classifications may not be used, as they once were to create or perpetuate the . . . inferiority of women.”<sup>39</sup>

In this passage, *Virginia* offers an historically informed anti-subordination standard to determine whether laws classifying on the basis of sex—including laws regulating pregnancy—violate equal protection. *Virginia*’s test breaks with the physiological naturalism of cases like *Geduldig*. Rather than “reason from the body” (and assert that “only women can become pregnant” or that “pregnancy is an objectively identifiable physical condition with unique characteristics”) as *Geduldig* did,<sup>40</sup> *Virginia* reasons from social relations—*Virginia* examines the ways that a law regulating pregnancy structures social relationships in order to determine whether state action classifying on the basis of pregnancy violates equal protection.

In short, our brief reads *Virginia* as *repudiating* reasoning from the body in earlier cases like *Geduldig*, and so advances a reading of *Virginia* of significance in cases involving the regulation of pregnancy inside and outside the abortion context, and even in litigation involving trans-exclusionary laws, where *Virginia* is sometimes invoked as if the case sanctioned claims of physical difference as a limit on equal protection claims, when it does exactly the reverse.<sup>41</sup> In

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<sup>38</sup> *Virginia*, 518 U.S. at 533 (quoting *Cal. Fed.*, 479 U.S. at 289 (first alteration in original)).

<sup>39</sup> *Id.* at 534 (internal citation omitted).

<sup>40</sup> See *supra* note 25.

<sup>41</sup> State laws banning transgender minors from participation on sports teams aligning with their gender identity cite *Virginia* before seeking to codify highly restrictive and contested definitions of “biological” sex. See IDAHO CODE

*Virginia*, Justice Ginsburg observes that government can regulate in matters concerning physical differences *so long as* classifications are not employed “for the denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”<sup>42</sup> These cautionary passages of the opinion call for the application of anti-stereotyping and anti-subordination principles to laws justified on the basis of claims about physical difference, rather than simply deferring to claims about “biology” or “nature.”<sup>43</sup>

We can now extend *Virginia*’s principles to proximate cases involving pregnancy that *Virginia* did not directly address. Where matters of pregnancy are concerned, *Virginia* tells us, the law cannot enforce sex-role stereotypes that denigrate or impose constraints on individual opportunity. Those sex-role stereotypes include the belief that motherhood is woman’s “paramount destiny,”<sup>44</sup> that women who are poor or of color should have fewer children,<sup>45</sup> or that a man or a nonbinary person cannot be pregnant.<sup>46</sup> Sex-role stereotypes have always applied differently based on race, class, sexuality and other characteristics, but all have a common constitutional infirmity: they demean and subordinate based on sex in violation of *Virginia*.

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ANN. § 33-6202, 6203 (West 2021); W. VA. CODE ANN. § 18-2-25d. In litigation over transgender students’ access to sex-specific bathrooms, some judges have cited *Virginia* as though any sex-based policy reflecting a real physical difference cannot be discriminatory. *See* *Adams v. Sch. Bd. of St. Johns Cty., Fla.*, 3 F.4th 1299, 1334 (11th Cir.) (Pryor, J., dissenting), reh’g en banc granted, 9 F.4th 1369 (11th Cir. 2021); *Grimm v. Gloucester Cty. Sch. Bd.*, 976 F.3d 399, 400 (4th Cir. 2020) (Niemeyer, J., concurring in denial of rehearing en banc).

<sup>42</sup> *Id.*

<sup>43</sup> In the past, it was common place to point to biology or nature to justify law enforcing traditional and unequal roles. *See* *Muller v. Oregon*, 208 U.S. 412, 422–23 (1908) (reasoning that woman’s “physical structure and a proper discharge of her maternal functions” justify law restricting the hours a woman can work); *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896) (“Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”).

<sup>44</sup> *Bradwell v. The State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

<sup>45</sup> *See* Jamelle Bouie, *The Most Discriminatory Law in the Land*, SLATE (June 17, 2014, 11: 47 P.M.), v <https://slate.com/news-and-politics/2014/06/the-maximum-family-grant-and-family-caps-a-racist-law-that-punishes-the-poor.html> (observing that the family cap provisions of the Temporary Aid to Needy Families “was based on a racist stereotype of unfit black mothers. Today, family cap laws do nothing but punish the poor for being poor”)

<sup>46</sup> *See* Chase Strangio, *Can Reproductive Trans Bodies Exist?* 19 CUNY L. Rev. 223, 228-35 (2016)

## II. *United States v. Virginia* Provides a New Framework for Analyzing the Constitutionality of Abortion Restrictions

*Virginia* provides an equal protection framework for evaluating the 15-week ban at issue in *Dobbs*. Under the intermediate scrutiny standard set forth in *Virginia*, Mississippi must show that its decision to regulate health and life by sex-discriminatory means is substantially related to the achievement of an important governmental end.<sup>47</sup> *Virginia* requires the state to offer an “exceedingly persuasive justification” for its use of any sex-based classification; that is, Virginia requires the government to justify its use of sex-based (and coercive) means *without* relying on “overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>48</sup> Sex classifications may be used to promote equal opportunity, the Court explained, but sex “classifications may not be used, as they once were ... to create or perpetuate the legal, social, and economic inferiority of women.”<sup>49</sup>

Mississippi’s abortion ban fails that test.

Rather than relate every step of the brief’s argument, which is linked above and available online,<sup>50</sup> we have identified certain features of our equality analysis that might apply to abortion restrictions across legislative and judicial contexts.

**One: Mississippi’s Abortion Ban Classifies on the Basis of Sex, Triggering Equal Protection Scrutiny.** Since the nineteenth century until the present day, lawmakers have enacted

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<sup>47</sup> *United States v. Virginia*, 518 U.S. 515, 533 (1996).

<sup>48</sup> *Id.*

<sup>49</sup> *Virginia*, 518 U.S. at 534 (internal citation omitted).

<sup>50</sup> *See supra* note 21

abortion bans to regulate the conduct of women who are resisting motherhood.<sup>51</sup> Abortion bans past and present single out women for regulation. Mississippi’s abortion ban explicitly classifies by sex in the text of the statute itself, which prohibits physicians from performing an abortion on “a maternal patient” after 15 weeks.<sup>52</sup> Other recently enacted abortion bans expressly name the “woman” or “pregnant woman” they target and regulate.<sup>53</sup> Even if the text of a statute coercing pregnancy does not explicitly mention the sex of the pregnant persons the state has targeted, there is likely to be ample evidence in the deliberations leading to an abortion ban’s adoption.<sup>54</sup>

**Two: The Statute Coerces the Performance of the Maternal Role.** Abortion restrictions are sex-based, not simply because they single out women, but because they single out women to coerce performance of traditional sex role. Abortion bans historically and practically compel resistant women to continue pregnancy and so become mothers against their will, without recompense or support. In the nineteenth century, doctors who led the campaign to criminalize abortion openly emphasized the need to enforce women’s roles as wives and

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<sup>51</sup> See *infra* note 55.

<sup>52</sup> H.B. 1510 § 1(4), 2018 Leg., Reg. Sess. (Miss. 2018).

<sup>53</sup> Kentucky’s 15-week ban refers throughout to the “maternal patient” and “pregnant woman” throughout. 2022 Ky. Laws Ch. 210 (HB 3). Florida’s 15 week ban refers to the “woman” and “pregnant woman.” 2022 Fla. Laws Ch. 69. Oklahoma’s ban repeatedly refers to the “pregnant woman.” 2022 Okla. Sess. Laws § 11.

<sup>54</sup> If an abortion ban is enacted to regulate the conduct of women resisting motherhood, it remains sex-based even if incidentally affects others who become pregnant.

Even if legislators drafted an abortion ban that expressly applied to all who become pregnant, that ban would be sex-based and unconstitutional if it were based on the sex-role stereotype that the state can coerce persons who are pregnant to continue pregnancy without recompense or support, beliefs rooted in historically entrenched conception of women’s roles as mothers.

mothers, as our brief documents.<sup>55</sup> Compelling a woman to give birth is forced motherhood even if she places her child for adoption, and in nearly all cases she does not.<sup>56</sup>

**Three: The State’s Claims that Coerced Pregnancy Protects the Life of the Unborn and the Health of Women Rest on Sex-Role Stereotyping:** Under the Equal Protection Clause, government may classify by sex, if the sex-based means are substantially related to important government ends, and those reasons do not rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>57</sup>

To demonstrate that the Mississippi statute rests on constitutionally impermissible sex-role stereotyping, our brief first reads the statute itself in historical perspective and then examines the statute in wider policy context—following the method *Virginia* itself employs to probe state action for sex-role stereotyping.<sup>58</sup>

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<sup>55</sup> See Brief of Equal Protection Scholars at 13-16. In the nineteenth century, the physician who led the campaign to ban abortion, Dr. Horatio Storer, claimed that childbearing was “the end for which [married women] are physiologically constituted and for which they are destined by nature.” See HORATIO STORER, WHY NOT A BOOK FOR EVERY WOMAN 75-76 (1866); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800– 1900, 78, 89, 148 (1978) (recounting Storer’s role in persuading Americans to ban abortion). According to Storer, avoiding this pre-ordained biological and social role would lead to a woman’s physical and social ruin. See STORER, *supra*, at 37 (“[A]ny infringement of [natural laws] must necessarily cause derangement, disaster, or ruin.”) The American Medical Association’s 1871 *Report on Criminal Abortion* denounced a woman who ended a pregnancy: “She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract.” D.A. O’Donnell & W.L. Atlee, *Report on Criminal Abortion*, 22 TRANSACTIONS AM. MED. ASS’N 239, 241 (1871).

<sup>56</sup> A woman surely remains a mother if the state compelling motherhood tells her she is free to give the child away, but the woman herself does not experience that freedom. Gretchen Sisson, Lauren Ralph, Heather Gould & Diana Greene Foster, *Adoption Decision Making among Women Seeking Abortion*, 27 WOMEN’S HEALTH ISSUES 136 (2017) (in study of women denied abortions, finding that over 90% of those who gave birth chose parenting rather than adoption)

<sup>57</sup> *United States v. Virginia*, 518 U.S. 515, 533 (1996).

<sup>58</sup> See Brief of Equal Protection Scholars at 11 n. 8; See *Virginia*, 518 U.S. at 535-40 (determining from historical context that stereotyped beliefs about sex roles originating in nineteenth-century ideas about women’s physical and reproductive fragility underpinned the exclusion of women from VMI); *id.* at 539 (determining from policy context that VMI’s rejection of coeducation in 1986 did not reflect “any Commonwealth policy evenhandedly to advance diverse educational options”).<sup>59</sup> *Id.* at § 1(2)(b)(i)-(v) (citations omitted).

Mississippi advances two paternalist justifications for the 15-week ban: Mississippi claims the 15-week ban was enacted to (1) “protect the life of the unborn” and (2) “to protect the health of women.”<sup>59</sup> Do sex stereotypes shape the state’s pursuit of these ends?

*Protecting Unborn Life*: In what is perhaps the strongest indicator of the gendered role assumptions informing the law, the state assumes that pregnancy and motherhood can be compelled without support or recompense. This is the very sign of unconstitutional sex-role stereotyping Justice Blackmun emphasized in *Casey*.<sup>60</sup> Even if the community has decided to compel motherhood to protect unborn life, why does the community also expect the woman to bear the costs?

*Protecting Women’s “Health”*: Instead of acknowledging and endeavoring to offset any health or life burdens on women who are coerced into childbearing by the statute, Mississippi instead claims that in coercing motherhood over a women’s objection, the state is protecting *the woman* in addition to any fetal life she may carry. It only promotes the health of *women*, as well as the unborn, to coerce motherhood if one imagines motherhood is woman’s “paramount destiny.”<sup>61</sup>

In Part II of the brief, we show that the statute’s gender-paternalistic justification rests on distinctive stereotypes about women as “destined” for motherhood that date back to the nineteenth century anti-abortion campaigns and continue to play an important role in the modern prolife movement; the stereotypes’ continuing power distracts attention from the ways that an abortion ban overrides individuals’ judgments about the health risk abortion poses in comparison

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<sup>59</sup> *Id.* at § 1(2)(b)(i)-(v) (citations omitted).

<sup>60</sup> See *supra* text accompanying notes **Error! Bookmark not defined.-Error! Bookmark not defined..**

<sup>61</sup> *Bradwell v. The State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

to pregnancy and childbirth, which of course vary wildly with the individual's profile and circumstances.<sup>62</sup> Relying on these stereotypes, Mississippi assumed it could fulfill both of its important objectives, protecting fetal life and protecting women's health, without conflict, by prohibiting abortion after 15 weeks.

This showing of state action enforcing pregnancy for gender-stereotypic reasons might be enough to make out an equal protection violation, but we go on to demonstrate how these traditional sex-role assumptions in turn distort Mississippi's approach to protecting unborn life by examining the abortion ban in wider policy perspective.

**Four: Less Discriminatory Alternatives: The State Could Have Achieved Its Ends by More**

**Inclusive and Less Coercive Means**. Mississippi employed a sex-based coercive classification to achieve indisputably important governmental ends. The equal protection cases require government to give reasons for employing sex-based means to protect life and health and subject those reasons to skeptical scrutiny. By looking beyond the abortion context, we show that Mississippi had many policy tools for achieving its asserted ends—*such as providing appropriate and effective sex education and contraception to those who wish to avoid becoming parents and assisting those who wish to bear and raise healthy families*.<sup>63</sup> The state's preference for sex-based and coercive means appears less benign when examined in light of these other policy choices. To protect life and health, Mississippi did not have to rely on sex-based coercive

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<sup>62</sup> See Brief of Equal Protection Scholars at 13-19. For examples see *supra* note 55. For more on these nineteenth-century arguments, see Siegel, *Reasoning from the Body* at 280-323. On contemporary analogues, see Siegel, *Why Restrict Abortion?* at 298-309.

<sup>63</sup> For an illustration of these choices in Texas, see Cary Franklin, *Whole Woman's Health v. Hellerstedt and What It Means to Protect Women*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* 223 (Melissa Murray, Kate Shaw, & Reva B. Siegel eds. 2019). For an illustration of these choices in Louisiana, see Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on June Medical*, 2020 SUP. CT. REV. 277, 321-27.



means. Why then did the state pursue its ends by sex-based coercive means rather than by more inclusive and noncoercive means?

### **III. “Skeptical Scrutiny”: Expanding the Frame and Asking New Questions About the Ways the State Protects Health and Life**

Some conversations about abortion unfold as if the criminal law is the only instrument the state has at its disposal to protect health and life. Plainly this is not so. In the half century since *Roe*, we have learned that abortion rates are responsive to resources. Access to effective contraception lowers abortion rates.<sup>64</sup> Increasingly, women living in poverty resort to abortion because they are unable to provide for their families.<sup>65</sup> Yet, lawmakers and others who seek to ban abortion do not support policies that would achieve those ends by noncoercive means—by improving access to effective contraception, or by alleviating the conditions of poverty that lead many people to end pregnancies.

Mississippi is a case in point. States that wish to reduce abortion and to protect the life and health of women *and* of future generations can adopt many proven policy options, such as improving access to contraception, sex education, health care, financial assistance, childcare, and workplace protections. As Part III of our brief shows, Mississippi not only forewent these opportunities, it repeatedly turned down federal dollars that otherwise would have flowed to the

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<sup>64</sup> L.B. Finer & M.R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008-11*, 374 NEW ENG. J. MED. 843 (2016); Dreweke, *New Clarity for the U.S. Abortion Debate: A Steep Drop in Unintended Pregnancy is Driving Recent Abortion Declines*, GUTTMACHER POL’Y REV. Mar. 18, 2016, <https://www.guttmacher.org/gpr/2016/03/new-clarity-us-abortion-debate-steep-drop-unintended-pregnancy-driving-recent-abortion>

<sup>65</sup> See, e.g., Sabrina Tavernise, *Why Women Getting Abortions Now Are More Likely to Be Poor*, N.Y. TIMES, (July 9, 2019), <https://www.nytimes.com/2019/07/09/us/abortion-accessinequality.html> (“Half of all women who got an abortion in 2014 lived in poverty, double the share from 1994 ...”).

state for these purposes. Instead of providing care and support, again and again the state chose to target and control women.

But equal protection requires that before a state targets women with coercive, discriminatory regulation, it must first explore non-coercive, non-discriminatory alternative means to achieve its ends. Mississippi's failure to do so makes constitutionally suspect its purported justifications for the abortion ban. Expanding the frame to the broader policy context in which abortion restrictions are enacted also illuminates the ways in which the focus on abortion hinders progress on broadly shared goals of protecting health and lives. Looking beyond abortion law to take a more holistic view of policies that shape residents' lives and health allows us to ask: If states were not blinded by sex-based assumptions about women's "natural" roles as mothers, what might they do to more effectively protect the health and lives of women, children, and families?

### **Alternative 1: Use Available Federal Funds to Increase Access to Contraception and Provide Comprehensive Sex Education**

A state taking practical steps to minimize abortion would first help people of all genders avoid unwanted pregnancy. Access to contraception and comprehensive sex education are two inclusive and non-coercive methods to achieve this aim. Individuals seeking abortions in Mississippi might have avoided pregnancy had the state provided accurate sex education and information about birth control. For example, a young woman who terminated her pregnancy at the state's last remaining clinic explained "that because Mississippi teaches only abstinence in public schools, no one explained to her how to prevent pregnancy if she had sex."<sup>66</sup> The state

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<sup>66</sup> See Emily Wax-Thibodeaux & Ariana Eunjung Cha, *The Mississippi Clinic at the Center of the Fight to End Abortion in America*, WASH. POST (Aug. 24, 2021).

turned away federal funds to implement comprehensive sex education in favor of initiatives such as a “Teen Pregnancy Prevention Summit” featuring pamphlets discouraging the use of contraceptives.<sup>67</sup> The state made a considered policy choice: to take the coercive step of restricting abortion while foregoing measures that would reduce unplanned pregnancy in the first place.

### **Alternative 2: Use Available Federal Funds to Expand Medicaid and Increase Low-Income Residents’ Access to Health Care**

Mississippi asserts that restricting abortion will protect maternal health. But compelling pregnancy, especially for poor women of color who lack access to adequate medical care, jeopardizes mothers’ health and lives. Black women are especially at risk, suffering a pregnancy-related mortality rate nearly three times the rate for white women.<sup>68</sup>

Increasing access to health care is an inclusive, non-coercive means of improving health outcomes for pregnant persons, infants, and children.<sup>69</sup> Regular medical care and check-ups, for example, can reduce maternal deaths by as much as 60 percent.<sup>70</sup> But Mississippi—like many other states that resort to coercive means of reproductive control—has repeatedly rejected

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<sup>67</sup> The pamphlet warned girls that contraception would harm their “physical[,] emotional and spiritual well-being.” Andy Kopsa, *Sex Ed Without Condoms? Welcome to Mississippi*, THE ATLANTIC (Mar. 7, 2013), <https://www.theatlantic.com/national/archive/2013/03/sex-ed-without-condoms-welcome-to-mississippi/273802>. A public school sex education curriculum instructed students to unwrap a piece of chocolate, pass it around, and note how dirty it became in order to “show that a girl is no longer clean or valuable after she’s had sex.” Alana Semuels, *Sex Education Stumbles in Mississippi*, L.A. TIMES (Apr. 2, 2014).

<sup>68</sup> *Id.* at 12 (ranging from 51.9 to 61.4 deaths per 100,000 live births compared to 18.9 to 36.7 deaths per 100,000 live births). Between 2013 and 2016, Black women accounted for “nearly 80 percent of pregnancy-related cardiac deaths.” *Id.* at 16. A 2019 United Health Foundation report ranked Mississippi last in the nation in women’s and children’s health. UNITED HEALTH FOUNDATION, HEALTH OF WOMEN AND CHILDREN REPORT 8 (2019), <https://assets.americashealthrankings.org/app/uploads/executive-highlights-ahr-health-of-women-and-children.pdf>.

<sup>69</sup> Indeed, Medicaid expansion under the Affordable Care Act (ACA) reliably increases insurance access for low-income women. Jamie R. Daw et al., *Medicaid Expansion Improved Perinatal Insurance Continuity for Low-Income Women*, 39 HEALTH AFFS. 1531 (Sept. 2020).

<sup>70</sup> Emily E. Petersen et al., *Vital Signs: Pregnancy-Related Deaths, United States, 2011–2015, and Strategies for Prevention, 13 States, 2013–2017*, 68 MORBIDITY & MORTALITY WEEKLY REPORT 423 (May 10, 2019).

Medicaid expansion that could allow approximately 200,000 additional low-income residents to obtain coverage, even though the federal government would cover 90 percent of its cost.<sup>71</sup>

Compelling women to continue pregnancies without providing adequate health care also endangers infants. Mississippi has the highest rates of infant mortality in the nation, and Black babies are especially at-risk.<sup>72</sup> Early pre-natal care can save infants' lives: the U.S. Department of Health and Human Services found in 2019 that newborns were almost five times more likely to die if their mothers lacked such care.<sup>73</sup> Again, Mississippi *rejected free federal dollars* to insure hundreds of thousands of residents, instead forcing people to carry potentially dangerous pregnancies to term.

### **Alternative 3: Use Available Federal Funds to Maximize TANF Eligibility and Benefit Levels**

Many Americans who end pregnancies cite a lack of economic resources among the primary reasons for their decision.<sup>74</sup> Temporary Assistance to Needy Families (TANF) gives states a means to support people in making a choice to continue their pregnancies by providing them direct benefits for existing dependent family members. Yet, at the time of the *Dobbs* litigation, Mississippi set its TANF benefits at the lowest levels in the nation. (In contrast, six

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<sup>71</sup> Sarah Varney, *How Obamacare Went South in Mississippi*, THE ATLANTIC (Nov. 4, 2014), <https://www.theatlantic.com/health/archive/2014/11/how-obamacare-went-south>; Jimmie E. Gates, *Mississippi Could Gain 21,700 Jobs Under Medicaid Expansion*, MISSISSIPPI TODAY, May 21, 2021, <https://mississippitoday.org/2021/05/21/medicaid-expansion-mississippi-gain-jobs/>. [90%

<sup>72</sup> MISS. STATE DEP'T OF HEALTH, INFANT MORTALITY REPORT 1 (2019), [https://msdh.ms.gov/msdhsite/\\_static/resources/8431.pdf](https://msdh.ms.gov/msdhsite/_static/resources/8431.pdf). Black infants comprise most infant deaths in Mississippi and are almost twice as likely to die as white infants. *Id.* at 8.

<sup>73</sup> See Dep't of Health & Hum. Servs. Off. on Women's Health, PRENATAL CARE, <https://www.womenshealth.gov/a-ztopics/prenatal-care> (Apr. 1, 2019).

<sup>74</sup> See M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC WOMEN'S HEALTH 29 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3729671/>; . And see *supra* note **Error! Bookmark not defined.** and accompanying text.

states set the maximum benefit at forty to sixty percent of the federal poverty line for a family of three, with the most generous state’s benefit levels exceeding Mississippi’s by tenfold.<sup>75)</sup>

States have wide discretion to allocate TANF block grants.<sup>76</sup> Only a small percentage of federal money goes to beneficiaries, with anti-abortion states providing the lowest benefit and eligibility levels. These states frequently divert funds to “crisis pregnancy centers,” which dissuade people from ending pregnancies without providing medical care or support to parents. They often use TANF funds for measures such as marriage promotion initiatives and abstinence-only programs.<sup>77</sup> In 2019, Mississippi spent only five percent of its federal TANF funds on direct cash assistance, and less than ten percent of families living below the poverty line received TANF.<sup>78</sup> Less than 3,000 families received Mississippi’s maximum benefit of \$170 per month by 2021, down from 23,700 families in 1999.<sup>79</sup>

#### **Alternative 4: Repeal “Family Caps” that Deepen Child Poverty and Punish Poor Parents for Bearing Children**

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<sup>75</sup> *Policy Basics: Temporary Assistance for Needy Families*, CTR. ON BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/research/family-income-support/temporary-assistance-for-needy-families>.

<sup>76</sup> A 2016 study found that nationwide, less than a quarter of TANF funds went to direct cash assistance to families. Deborah Weinstein, *TANF at Twenty*, COALITION ON HUMAN NEEDS, Aug. 22, 2016, <https://www.chn.org/voices/tanf-at-twenty/>.

<sup>77</sup> Aditi Shrivastava & Gina Azito Thompson, *TANF Cash Assistance Should Reach Millions More Families to Lessen Hardship*, Ctr. on Budget & Pol’y Priorities, updated Feb. 18, 2022, <https://www.cbpp.org/research/family-income-support/tanf-cash-assistance-should-reach-millions-more-families-to-lessen>.

<sup>78</sup> Ali Safawi, *Mississippi Raises TANF Benefits but More Improvements Needed, Especially in South*, CTR. ON BUDGET & POL’Y PRIORITIES (May 4, 2021), <https://www.cbpp.org/blog/mississippi-raises-tanfbenefits-but-more-improvements-needed-especially-in-south>.

<sup>79</sup> See Anna Wolfe, *Mississippi Found ‘Absurd’ Ways to Spend Welfare on Anything but the Poor. These Bills Would Put More Money into Families’ Pockets*, MISS. TODAY (Jan. 29, 2021), <https://mississippitoday.org/2021/01/29/mississippi-found-absurd-ways-to-spendwelfare-on-anything-but-the-poor-these-bills-wouldput-more-money-into-families-pockets>. Mississippi has also wasted millions of dollars in TANF funds. Beginning in 2016, the director of the state’s Department of Human Services spearheaded the “largest public embezzlement scheme in state history.” See *id.* (describing how dollars meant for TANF went to “a new volleyball stadium, a horse ranch for a famous athlete, multi-million dollar celebrity speaking engagements, high-tech virtual reality equipment, luxury vehicles, steakhouse dinners, and even a speeding ticket.”); see also Anna Wolfe, *Embattled Welfare Group Paid \$5 Million for New USM Volleyball Center*, MISS. TODAY (Feb. 20, 2020), <https://mississippitoday.org/2020/02/27/welfare-program-paid-5-million-for-new-volleyball-center/>.

Abortion restrictions often go hand in hand with other coercive policies that discourage people from carrying pregnancies to term and make their lives—and those of their children—more difficult when they do. For instance, “family caps” (or “child exclusion” policies) limit TANF benefits to additional children born into families receiving public assistance. These policies echo the sordid history of reproductive controls targeting poor women and women of color; lawmakers often explicitly justify them as disincentives to childbearing.<sup>80</sup> In recent years, many states have repealed family caps because of their detrimental impact on the health and well-being of children and families. Mississippi is among just a dozen states that maintain a family cap despite similar efforts at repeal.<sup>81</sup> Again, rather than reducing abortion by helping low-income residents who choose to bear and raise children support their families, Mississippi chooses discriminatory, coercive measures that exacerbate the concerns of poor and low-income parents who fear that having another child will undermine their ability to care for existing children.

### **Alternative 5: Use Available Federal Funds for Childcare Assistance to Enable Parents to Coordinate Family Support and Care**

Childcare funding—or lack thereof—provides another telling measure of whether a state has pursued inclusive, non-coercive means of aiding residents who wish to continue pregnancies while providing for existing dependents. In Mississippi, less than two months after the legislature passed the abortion ban challenged in *Dobbs*, the *Jackson Clarion-Ledger* reported that the state welfare department had returned \$13 million in federal childcare funding for low-income

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<sup>80</sup> See Ife Floyd, *States Should Follow New Jersey: Repeal Racist ‘Family Cap’*, CTR. ON BUDGET & POL’Y PRIORITIES, Oct. 14, 2020, <https://www.cbpp.org/blog/states-should-follow-new-jersey-repeal-racist-family-cap>.

<sup>81</sup> *Id.*; Teresa Wiltz, *Family Welfare Caps Lose Favor in More States*, PEW STATELINE (May 3, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/05/03/family-welfare-caps-lose-favor-in-more-states>.

working parents because the state failed to meet its match obligation—despite a waiting list of 21,500 children whose parents lack childcare.<sup>82</sup>

### **Alternative 6: Protect Pregnant Workers from Discrimination and Require Accommodations for Pregnancy in the Workplace**

The ability or inability to obtain and keep gainful employment also influences individuals' decisions about whether and when to become parents.<sup>83</sup> A state committed to encouraging women to carry pregnancies to term under conditions that enable them to support themselves and their families should seize every opportunity to enhance the rights of pregnant workers. Indeed, many states and localities have enacted Pregnant Workers Fairness Acts in recent years.<sup>84</sup> Others, including Mississippi, have rejected such inclusive and nondiscriminatory measures that protect pregnant people, parents, and children, instead targeting women with coercive restrictions that compel pregnancy.<sup>85</sup>

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Mississippi could have provided care and support for individuals who seek to avoid pregnancy or who wish to bear children while preserving their health, dignity, and ability to provide for existing family members. Instead of pursuing these nondiscriminatory, non-coercive alternatives, the state chose to prevent women and other pregnant people from making the most

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<sup>82</sup> Anna Wolfe & Sarah Fowler, *Human Services Leaves \$13M in Child Care Funds on the Table*, MISS. CLARION-LEDGER, Jan. 30, 2018, <https://www.clarionledger.com/story/news/local/2018/01/29/human-services-leaves-13-m-child-care-funds-table/1065001001/> [check numbers]

<sup>83</sup> []

<sup>84</sup> As of 2018, at least twenty-three states and several localities had passed Pregnant Workers' Fairness Acts. See A BETTER BALANCE, MAP OF PREGNANT WORKERS' FAIRNESS ACTS, updated July 2018, <https://www.abetterbalance.org/resources/map-state-pregnant-worker-fairness-laws/>. [UPDATE (and reference Senate)]

<sup>85</sup> *See id.*

intimate, consequential life decisions for themselves, and to force them to give birth under dangerous and demeaning conditions.<sup>86</sup> Its decision to provide some of the lowest levels of TANF support<sup>87</sup> even as it has the highest levels of infant mortality in the nation,<sup>88</sup> its decision to preserve family caps even as other states are repealing them,<sup>89</sup> all point to persistent stereotyping and devaluation of imagined beneficiaries as undeserving and irresponsible<sup>90</sup>—from inference and context, low-income Black women.<sup>91</sup> These policy choices reveal that abortion restrictions like Mississippi’s function “more as a tool of control than as an expression of care for . . . women and children.”<sup>92</sup>

### **III. [under development]**

### **IV. Beyond *Dobbs*: Extensions and Applications**

In our brief, expanding the frame to examine a state’s choices about abortion law as one of many potential ways of protecting life and health advances an antidiscrimination inquiry: it enables us to probe the strength of the state’s reasons for employing sex-based coercive means to achieve its indisputably important ends. The brief spotlights the narrow bundle of policies we have come to term “prolife” and the attitude toward regulated communities they express.

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<sup>86</sup> [check language]

<sup>87</sup> *See supra* text at note 75.

<sup>88</sup> *See supra* text at note 72.

<sup>89</sup> *See supra* text at note 81.

<sup>90</sup> *See supra* text at note 45.

<sup>91</sup> For a debate among white and Black Mississippi lawmakers about the women regulated by the State’s abortion restrictions, including remarks by Republican Sen. Joey Fillingane, cosponsor of HB 1510, *see* Emily Wagster Pettus, *Mississippi Considers Abortion Ban After Fetal Heartbeat*, ABC NEWS, (Feb. 5, 2019), <https://abcnews.go.com/us/wirestory/mississippiconsiders-abortion-ban-fetal-heartbeat-60864978>.

<sup>92</sup> Brief at 28-29.



Frame expansion arguments of this kind can play many roles. Such arguments can be asserted in politics to criticize states employing carceral means to protect life. Or they can be invoked to forge coalitions in favor of inclusive, noncoercive means of protecting life, whether it is by supporting those who are sexually active and wish to avoid becoming parents, or by supporting those who become parents and need the community’s assistance in raising families.<sup>93</sup>

There are many other institutional contexts in which the brief’s arguments can contribute. Congress can enact legislation protecting abortion access under its powers to enforce the Equal Protection Clause.<sup>94</sup> State legislators can also invoke *Virginia* as they advance equality-based rights to abortion or contraception.<sup>95</sup> At least one state court has appealed to *Virginia* as

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<sup>93</sup> See Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How--and Why It Matters In Law and Politics*, 93 IND. L.J. 207 (2018); Siegel, *supra* note **Error! Bookmark not defined.** (employing frame expansion to analyze Louisiana’s choices in *June Medical*).

<sup>94</sup> See Women’s Health Protection Act, H.R. 3755, 117th Cong. § 2(a)(25)(B) (2021) (“Congress has the authority to enact this Act to protect abortion services pursuant to— . . . its powers under section 5 of the Fourteenth Amendment to the Constitution of the United States to enforce the provisions of section 1 of the Fourteenth Amendment”).

<sup>95</sup> The Preamble to New Jersey’s Reproductive Freedom Act, which was enacted in 2022 and codifies the right to abortion in state law, states that “[s]elf-determination in reproductive choice is key to helping establish equality among the genders and to allowing all people of childbearing age to participate equally” in “economic and social life.” N.J. STAT. ANN. § 10:7-1(c). Similarly, the “policy and purpose” section of New York’s Reproductive Health Act (enacted in 2019) states: “The legislature finds that comprehensive reproductive health care is a fundamental component of every individual’s health, privacy and equality.” N.Y. PUB. HEALTH LAW § 2599-aa. An amendment to constitutionalize the abortion right in Vermont, headed to the ballot in November 2022, emphasizes its purpose section that “[e]nshrining [the abortion] right in the Constitution is critical to ensuring equal protection and treatment under the law.” Proposal 5, Gen. Assemb. (Vt. 2022) (as adopted by the Senate and House and delivered to the Secretary of Senate), <https://legislature.vermont.gov/Documents/2022/Docs/BILLS/PR0005/PR0005%20As%20adopted%20by%20the%20Senate%20and%20the%20House%20Official.pdf>.

persuasive authority in interpreting its own state constitution's equality clause.<sup>96</sup> Other state courts have looked to their states' equal rights amendments.<sup>97</sup>

Finally, of course, the brief also bears on debates over the Equal Rights Amendment (ERA).<sup>98</sup> In the late 1970s, Phyllis Schlafly began to focus her anti-ERA attack on the claim that the ERA would constitutionalize abortion rights and same-sex marriage.<sup>99</sup> Most on the Left, appreciating the political danger, dodged the equality question in various ways, including by speaking in the language of liberty.<sup>100</sup> Schlafly's attack produced a politically upside down world in which, for generations, opponents of the ERA have insisted that the ERA would

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<sup>96</sup> In 2018, the Iowa Supreme Court struck down an abortion restriction, emphasizing that “[d]isparate treatment and relegation of women to a subject sex may no longer be accomplished through the proxy of role differentiation.” *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 NW.2d 206, 245 (Iowa 2018) (holding that seventy-two hour mandatory delay for abortion violated the state constitution). Indeed, the court quoted *Virginia* in expounding the equal protection basis for its decision: “Equal protection of the law now prevents governments from ‘den[ying] to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capabilities.’” *Id.* (quoting *Virginia*, 518 U.S. at 532).

<sup>97</sup> In one early case, for example, a Connecticut court held that a restriction on public funding for abortion violated the state's Equal Rights Amendment precisely because of the sex stereotypes at the root of the restriction. *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986). The court reasoned that “[s]ince time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them,” emphasizing the “devastating effect” that such discrimination has had. *Id.* at 159. The court held that Connecticut's restriction on funding for abortion constituted “sex oriented discrimination” and therefore ran afoul of the state constitution. *Id.* at 159–60. Similar equality-based reasoning has been applied across the states. *See, e.g., N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 854, 856 (N.M. 1998) (holding that ban on Medicaid funding for abortion violated the state ERA, noting that “[h]istory teaches that lawmakers have often attempted to justify gender-based discrimination on the grounds that it is ‘benign’ or ‘protective’ of women” and that the abortion restriction “undoubtedly single[d] out for less favorable treatment a gender-linked condition that is unique to women”).

<sup>98</sup> Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. H.R.J. Res. 208, 92nd Cong., 86 Stat. 1523 (1972).

<sup>99</sup> *See* MARJORIE J. SPRUILL, *DIVIDED WE STAND: THE BATTLE OVER WOMEN'S RIGHTS AND FAMILY VALUES THAT POLARIZED AMERICAN POLITICS* 8-13 (2017) (recounting how at International Women's Year conference in Houston Texas in 1977 the ERA's opponents allied with opponents of abortion and gay rights and emerged as the new pro life, pro family movement). PHYLLIS SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* 89-90 (1977) (predicting ERA would require homemakers to seek careers, protect the right to an abortion and grant same-sex couples the right to marry).

<sup>100</sup> *See* for example, Serena Mayeri, *A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 NORTHWESTERN U.L. REV. 1223, 1274-80 (2009).

constitutionalize protections for the abortion right, while supporters of the ERA evaded the question.<sup>101</sup>

An equal protection abortion rights argument today has the potential to shift this dynamic. Observe that the first premise of the abortion-objection to ERA is that abortion rights are liberty rights that depend on the Due Process Clause, and further, that the Equal Protection Clause is *silent* on the subject of abortion. ERA threatens the prolife movement only because the ERA seems to introduce equality constraints on the regulation of abortion into the federal Constitution that are otherwise *not there*. Our brief disputes that initial premise, as we show that the Equal Protection Clause of the Fourteenth Amendment, interpreted under canonical cases decided since the 1990s, can limit the regulation of abortion—or could if the Equal Protection Clause were properly enforced by judges not utterly closed to the claims. Presumably an ERA would be subject to the same interpretive constraints. On our reading of *United States v. Virginia*, the abortion objection to ratification of the Equal Rights Amendment becomes considerably harder to sustain.

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<sup>101</sup> See, e.g., Eleanor Mueller & Alice Miranda Ollstein, *How the Debate Over the ERA Became a Fight Over Abortion*, POLITICO (Feb. 11, 2020, 5:05 EST), <https://www.politico.com/news/2020/02/11/abortion-equal-rights-amendment-113505> (opponents calling the ERA “abortion in disguise,” “Roe 2.0,” and argued that “ERA should stand for ‘Everything Related to Abortion,’” while supporters contend that “opponents are merely pursuing a socially palatable way of opposing gender equality”). *But see Equal Rights Amendment: Hearing Before the Subcomm. on the Const. C.R., & C.L. of the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Sen. Carolyn Maloney) (“the Equal Rights Amendment has absolutely nothing to do with abortion”).