

No. 19-1392

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IN THE  
**Supreme Court of the United States**

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THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE  
MISSISSIPPI DEPARTMENT OF HEALTH, ET AL.,

*Petitioners,*

*v.*

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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**BRIEF FOR AMICUS CURIAE  
THE HOWARD UNIVERSITY SCHOOL OF LAW  
HUMAN AND CIVIL RIGHTS CLINIC IN  
SUPPORT OF RESPONDENTS**

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ACLU Mississippi, <i>Know Your Rights</i> , <a href="https://perma.cc/Y3P5-E9UK">https://perma.cc/Y3P5-E9UK</a> .....	24

- Shawn Leigh Alexander, *Reconstruction Violence and the Ku Klux Klan Hearings* (2005)..... 9, 10
- Kathleen C. Basile et al., *Rape-Related Pregnancy and Association With Reproductive Coercion in the U.S.*, 55 *Am. J. Preventive Med.* 770 (2018)..... 33, 35
- Blackburn Ctr., *The Barriers That May Prevent Black Women From Reporting Sexual Assault* (Feb. 18, 2020), <https://perma.cc/A7AS-M954>..... 33
- Matthew J. Brieding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization--National Intimate Partner and Sexual Violence Survey, United States, 2011*, CDC (Sept. 5, 2014), <https://perma.cc/A9FJ-QST9>..... 33
- Thema Bryant-Davis, Sarah E. Ullman, Yuying Tsong, Shaquita Tillman & Kimberly Smith, *Struggling to Survive: Sexual Assault, Poverty, and Health Outcomes of African American women*, 80 *Am. J. Orthopsychiatry* 1 (2010)..... 34

- Ctr. for Miss. Health Pol’y, *Postpartum Medicaid Issue Brief* (Feb. 2021),  
<https://perma.cc/3BTX-R7N4>..... 22
- Angela Y. Davis, *Women, Race & Class*  
 (1981).....*passim*
- Michele R. Decker, Charvonne N.  
 Holliday, Zaynab Hameeduddin,  
 Roma Shah, Janice Miller, Joyce  
 Dantzler & Leigh Goodmark, “*You  
 Do Not Think Of Me as a Human  
 Being*”: *Race and Gender Inequities  
 Intersect to Discourage Police  
 Reporting Against Women*, 96 J.  
 Urban Health 772 (2019)..... 33, 35
- Asha DuMonthier, Chandra Childers &  
 Jessica Milli, *The Status of Black  
 Women in the United States*, Inst. for  
 Women’s Pol’y Res. (2017),  
<https://perma.cc/26SM-KJ3F>..... 35
- Bruce Fehn, *Thomas Jefferson and  
 Slaves: Teaching an American  
 Paradox*, 14 OAH Magazine of  
 History 2 (2000) ..... 6
- Henry Louis Gates, Jr., *To Be Raped,  
 Bred, and Abused*, N.Y. Times, Nov.  
 22, 1987 ..... 6

Michele Goodwin, <i>Women on the Frontlines</i> , 106 Cornell L. Rev. 851 (2021).....	19, 21
Susan Green, <i>Violence Against Black Women – Many Types, Far-reaching Effects</i> , Inst. for Women’s Pol’y Res., (July 13, 2017), <a href="https://perma.cc/7W32-FLBA">https://perma.cc/7W32-FLBA</a> .....	33
Guttmacher Inst., <i>Mississippi is Attacking Roe v. Wade Head On, the Consequences Could Be Severe</i> (Aug. 17, 2021), <a href="https://perma.cc/NAF6-CFJY">https://perma.cc/NAF6-CFJY</a> .....	24
Guttmacher Inst., <i>State Facts About Abortion: Mississippi</i> , <a href="https://perma.cc/R6QA-KKT3">https://perma.cc/R6QA-KKT3</a> .....	24
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A. Leon Higginbotham, Jr., <i>In the Matter of Color: Race and the American Legal Process</i> (1978).....	7
Melisa M. Holmes, MD, Heidi S. Resnick, PhD, Dean G. Kilpatrick, PhD, & Connie L. Best, PhD <i>Rape-Related pregnancy: Estimates and descriptive characteristics from a</i>	

- national sample of women*, 175 Am. J. Obstet. & Gynecol. 320 (1996)..... 32
- Inst. for Women's Pol'y Res., *The Status of Black Women in the United States*, <https://perma.cc/VS2H-GJRF> ..... 32, 33
- Jenna Jerman, Rachel K. Jones & Tsyoshi Onda, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Inst. (May 2016), <https://perma.cc/K9ZB-LCHM>..... 24
- Kaiser Family Found., *Medicaid Coverage Rate for the Nonelderly by Race/Ethnicity*, <https://perma.cc/9BRG-9HU2> (last visited Sept. 15, 2021) ..... 22
- Kaiser Family Found., *Poverty Rate by Race/Ethnicity*, <https://perma.cc/CM2P-3EIJ>..... 25
- Kavitha Kolappa, David C. Henderson & Sandeep P. Kishore, *No Physical Health Without Mental Health: Lessons Learned?*, 91 Bull. World Health Org. 3-3A (2013), <https://perma.cc/5EKN-LNNN> ..... 29
- Susan H. Lewis, *Unspoken Crimes: Sexual Assault in Rural America* (2003)..... 31

- P.R. Lockhart, *Mississippi's New Abortion Ban Will Hit Black Women the Hardest*, VOX (Mar. 23, 2018), <https://perma.cc/8GBF-NM55> ..... 23, 25
- Lisa Marshall, *Study: Banning Abortion Would Boost Maternal Mortality By Double Digits*, CU Boulder Today (Sept. 8, 2021), <https://perma.cc/6MWG-8A5M> ..... 20
- Danielle L. McGuire, *At the Dark End of the Street: Black Women, Rape, and Resistance—A New History of the Civil Rights Movement* (2010) ..... 9, 26
- Med. U. of S.C., *Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study* (2007), <https://perma.cc/AV7F-GYFP> ..... 31
- Miss. Dep't of Health, *Mississippi Maternal Mortality Report, 2013–2016* (Apr. 2019), <https://perma.cc/ZCX4-GHRV> ..... 19, 20, 23
- Miss. St. Dep't of Health, *Health Equity in Mississippi*, <https://perma.cc/5GP6-HFCC> (last visited Sept. 14, 2021) ..... 21
- Mississippi College School of Law, Legislative History Project, Video of

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Mississippi College School of Law, Legislative History Project, Video of House Concurring in Amend. From Senate of H.B. 1510 (Mar. 8, 2018), <a href="https://perma.cc/3MXN-WZ5D">https://perma.cc/3MXN-WZ5D</a> .....	28
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Melissa Murray, <i>Race-Ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade</i> , 134 Harv. L. Rev. 2025 (2021).....	13
Nat'l Coalition Against Domestic Violence, <i>Domestic Violence and Sexual Assault</i> , <a href="https://perma.cc/XD3H-BVFT">https://perma.cc/XD3H-BVFT</a> .....	34
Nat'l Ctr. for Health Stat., <i>Infant Mortality Rates by State</i> , <a href="https://perma.cc/JK8U-ZDFT">https://perma.cc/JK8U-ZDFT</a> .....	23
The Nat'l Ctr. on Violence Against Women in the Black Cmty., <i>Black Women and Sexual Assault</i> , <a href="https://perma.cc/HV9X-QJMD">https://perma.cc/HV9X-QJMD</a> .....	34

- Nat'l P'ship for Women and Families,  
*Black Women Experience Pervasive  
 Disparities in Access to Health  
 Insurance* (Apr.  
 2019), <https://perma.cc/6JDT-AC5Y>..... 23
- Nat'l P'ship for Women and Families,  
*Black Women's Maternal Health: A  
 Multifaceted Approach to Addressing  
 Persistent and Dire Health  
 Disparities* (Apr. 2018),  
<https://perma.cc/PG5J-EPAZ>..... 20
- Nat'l Victim Ctr. & Crime Victims Res.  
 and Treatment Ctr., *Rape in  
 America: A Report to the Nation*  
 (Apr. 23, 1993),  
<https://perma.cc/DT65-KNXG> ..... 30, 31
- Nat'l Women's L. Ctr. & Miss. Black  
 Women's Round Table, *Women  
 Driving Change: A Pathway to a  
 Better Mississippi*,  
<https://perma.cc/ZH3H-8THB> ..... 22, 25
- Nat'l Women's L. Ctr., *Mississippi*,  
<https://perma.cc/6NP3-QBFS> (last  
 visited Sept. 14, 2021) ..... 21, 25
- Michael Ollove, *States Push to Extend  
 Postpartum Medicaid Benefits to  
 Saves Lives*, Pew (May, 5, 2021),  
<https://perma.cc/W799-NEZY> ..... 22

<i>Racial Disparities in Maternal Health Have Widened Since 1980s, Federal Report Says</i> , Mod. Healthcare (Sept. 15, 2021), <a href="https://perma.cc/F76J-FTWE">https://perma.cc/F76J-FTWE</a> .....	19
RAINN, <i>Depression</i> , <a href="https://perma.cc/KUU2-E8KB">https://perma.cc/KUU2-E8KB</a> (last visited Sept. 13, 2021) .....	30
RAINN, <i>Victims of Sexual Violence: Statistics</i> , <a href="https://perma.cc/XT6C-954Q">https://perma.cc/XT6C-954Q</a> (last visited Sept. 13, 2021) .....	29
Dorothy Roberts, <i>Killing the Black Body: Race, Reproduction, and the Meaning of Liberty</i> (1997) .....	<i>passim</i>
Amy Roeder, <i>America is Failing its Black Mothers</i> , Harv. Pub. Health Rev. (2019), <a href="https://perma.cc/V3RL-PD8K">https://perma.cc/V3RL-PD8K</a> .....	18
Loretta J. Ross, <i>African-American Women and Abortion: A Neglected History</i> , 3 J. of Health Care for the Poor and Underserved 274 (1992).....	14, 15
J. Allison Strickland, <i>Rape Exceptions in Post-Webster Antiabortion Legislation: A Practical Analysis</i> , 126 Colum. J. L. & Soc. Probs. 163 (1992).....	31, 32

Jamila Taylor, *Racism, Inequality, and African Americans*, Century Found. (Dec. 19, 2019), <https://perma.cc/S6QP-GCPT> ..... 19

Jamila Taylor, *Structural Racism and Maternal Health Among Black Women*, 48 *J. of L., Med., & Ethics* 506 (2020)..... 18

U.S. Census Bureau, *Quick Facts Mississippi*, <https://perma.cc/QJ9J-DFET> (last visited Sept. 14, 2021)..... 21

Harriet A. Washington, *Medical Apartheid: The Dark History of Medical Experimentation on Black Americans from Colonial Times to the Present* (2006).....*passim*

Carolyn M. West & Kalimah Johnson, *Sexual Violence in the Lives of African American Women*, Nat'l Online Res. Ctr. on Violence Against Women (Mar. 2013), <https://perma.cc/27F2-95YR> ..... 35

## **INTEREST OF AMICUS CURIAE<sup>1</sup>**

Howard University School of Law is the nation’s first historically Black law school. For more than 150 years since its founding during Reconstruction, the law school has worked to train “social engineers” devoted to the pursuit of human rights and racial justice. As part of this mission, the Howard University School of Law’s Human and Civil Rights Clinic advocates on behalf of clients and communities fighting for the realization of civil rights guaranteed by the U.S. Constitution. The Clinic has a particular interest in eradicating gender and racial disparities in the American legal system and dismantling unjust laws and policies that serve to undermine vital human rights—including the right to reproductive liberty guaranteed by the Due Process Clause of the Fourteenth Amendment.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Women’s “ability to control their reproductive lives”—including the freedom to terminate pregnancy prior to fetal viability—is a fundamental “component of liberty” protected by the Fourteenth

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<sup>1</sup> The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

The arguments presented in this brief are made on behalf of the Human and Civil Rights Clinic—not the Howard University School of Law or Howard University.

Amendment.<sup>2</sup> This is a settled “rule of law” that this Court has refused to renounce for nearly half a century.<sup>3</sup> Yet Mississippi now asks this Court to extinguish women’s right to reproductive freedom and to grant a constitutional stamp of approval for the State’s Gestational Age Act (“the Ban”), which prohibits abortion after 15 weeks’ gestation, long before the point of fetal viability.<sup>4</sup> This case thus represents a threat to the bodily autonomy of all women. But for Black women,<sup>5</sup> this threat is uniquely severe and painful. Amicus writes to place Mississippi’s attempt to restrict abortion access within the historical context of state regulation of Black women’s procreative liberty.<sup>6</sup>

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<sup>2</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856, 871 (1992).

<sup>3</sup> *Id.*

<sup>4</sup> Miss. Code. Ann. § 41-41-191. The State has conceded that it is “unable to identify any medical research or data that shows a fetus has reached the ‘point of viability’ at 15 weeks LMP.” *Jackson Women’s Health Org. v. Currier*, 349 F. Supp. 3d 536, 540 (S.D. Miss. 2018).

<sup>5</sup> Although amicus uses the term “women” throughout this brief, individuals of all gender expressions may also become pregnant and seek abortion services. *See Reprod. Health Servs. v. Strange*, 3 F.4th 1240, 1246 n.2 (11th Cir. 2021).

<sup>6</sup> In evaluating state restrictions on abortion, this Court has looked to “medical and medical-legal history,” *Roe v. Wade*, 410 U.S. 113, 117 (1973), and observed that the “the proper focus of the constitutional inquiry is the group for whom the law is a restriction,” *Casey*, 505 U.S. at 837–38. The history of medical and legal regulation of Black women’s reproduction is thus especially relevant here, given that Black women account for a significant percentage of Mississippi’s population.

Since their arrival on American shores more than four centuries ago, Black women have been subjected to invasive state regulation of their reproductive functions. During slavery, Black women were denied all bodily autonomy; the law expressly endorsed the notion that they lacked humanity and could be “bred” for their owner’s profit. The denial of reproductive freedom continued after emancipation, when Black women were subject to pervasive sexual violence and compulsory sterilization. Though the goal has changed depending on state interests—initially forcing procreation for profit and then destroying reproductive function to accomplish social objectives—the government’s effort to control Black women’s reproduction has been consistent. Black women embraced birth control, which includes the right to safe abortion care, partly in defiance of white supremacist efforts to control their bodies—and to protect themselves from high maternal mortality rates caused by social and economic oppression.

Mississippi’s law is the latest incarnation of state attempts to control Black women’s reproductive choices. The state would force Black women to continue pregnancies against their wishes—even though continued high maternal mortality rates and other health risks disproportionately threaten their lives. And despite a claimed interest in women’s health, Mississippi’s law makes no exception for pregnancies forced on women by rape or incest—a particularly vile omission for Black women given the history of sexual violence against them.

This Court should affirm the decision of the Fifth Circuit Court of Appeals and once again affirm a woman's right to terminate her pregnancy.

## ARGUMENT

### I. **Black Women Have Been Denied Bodily Autonomy And Reproductive Freedom**

The import of kidnapped African women to the Virginia colony in 1619 marked the beginning of centuries of systemic, state-sanctioned denial of reproductive freedom for Black women. Few parts of human anatomy have been subject to more depraved brutality and government regulation than Black women's reproductive systems. From bondage in chattel slavery, where they were forced to bear children that the law regarded as property of their masters, through compulsory sterilization, where they were forced into infertility, Black women were robbed of any sense of bodily autonomy. Access to birth control—effective contraceptives and safe abortions—is a fundamental freedom for *all* women. But for Black women, it represents the restoration of liberty they were long denied.

#### A. **Forced Reproduction in Bondage**

The American institution of slavery was fundamentally incompatible with humanity. So from the very beginning, those committed to chattel slavery—both the individuals who owned slaves and the government institutions that supported them—acted to destroy any notion of Black personhood. Fueled by pseudo-science and pernicious stereotypes, those

engaged in the trade of Black bodies operated on the presumption that Black women, like “rutting animals,” were “unable to control their powerful sexual drives.”<sup>7</sup> This denial of Black women’s humanity unleashed widespread sexual violence that would persist for centuries.

The horror began when African women were forced aboard slave ships, where white “officers [were] permitted to indulge their passions” in ways that “disgrace human nature.”<sup>8</sup> It continued unabated on American plantations, where Black women were made “victim of the grossest passions” of their masters.<sup>9</sup> Enslaved Black women had no power to refuse; it was the white “owner of the woman who decided when and with whom she would have sexual relations.”<sup>10</sup>

After Congress prohibited the importation of slaves in 1808, slave masters—who could no longer rely on the international slave trade to replenish their labor force—gained an acute “economic incentive to govern Black women’s reproductive lives.”<sup>11</sup> Female slaves were “valuable to their masters not only for

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<sup>7</sup> Harriet A. Washington, *Medical Apartheid: The Dark History of Medical Experimentation on Black Americans from Colonial Times to the Present* 66 (2006).

<sup>8</sup> *Id.*

<sup>9</sup> Beverly Guy-Sheftall, *Daughters of Sorrow: Attitudes Toward Black Women, 1880–1920* at 60 (1990).

<sup>10</sup> Washington, *supra* note 7, at 66.

<sup>11</sup> Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 41 (1997).

their labor, but also for their ability to produce more slaves.”<sup>12</sup> Given the “premium . . . placed on the slave woman’s reproductive capacity,” slave owners resorted to a variety of techniques to encourage “breeding:”<sup>13</sup> “They rewarded pregnancy with relief from work in the field and additions of clothing and food, punished slave women who did not bear children, manipulated slave marital choices, and forced slaves to breed.”<sup>14</sup>

The value of enslaved Black women rested on their reproductive abilities. Thomas Jefferson once declared, “I consider a slave woman who breeds once every two years as profitable as the best worker on the farm.”<sup>15</sup> The entirety of an enslaved Black woman’s life was “defined by her reduction to a sexual object, an object to be raped, bred, and abused.”<sup>16</sup> Black women thus found themselves trapped in a political and social system that both denied their humanity and demanded total control of their reproductive functions.

American courts expressly sanctioned this “monstrous combination of racial and gender domination.”<sup>17</sup> Because Black women were regarded as mere

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<sup>12</sup> *Id.* at 42.

<sup>13</sup> Angela Y. Davis, *Women, Race & Class* 3 (1981).

<sup>14</sup> Roberts, *supra* note 11, at 45.

<sup>15</sup> Bruce Fehn, *Thomas Jefferson and Slaves: Teaching an American Paradox*, 14 *OAH Magazine of History* 2, 24 (2000).

<sup>16</sup> Henry Louis Gates, Jr., *To Be Raped, Bred, and Abused*, *N.Y. Times*, Nov. 22, 1987, § 7, at 12.

<sup>17</sup> Roberts, *supra* note 11, at 42.

personal property, courts made clear that they “could not legally be raped.”<sup>18</sup> Louisiana, for instance, excluded Black women from its criminal prohibition on rape.<sup>19</sup> A Mississippi court dismissed an indictment against a man charged with raping a Black girl under ten years old because “the crime of rape does not exist in this State between African slaves.”<sup>20</sup>

When Black women became pregnant—because of sexual violence or otherwise—the law regarded them as breeding animals who had no claim to their children. One of our nation’s first statutes—enacted by the Virginia colony in 1662—made all children of enslaved women the property of their masters by operation of law.<sup>21</sup> A South Carolina court, in an opinion typical of the time, later declared that “the young of slaves . . . stand on the same footing as animals.”<sup>22</sup> All of this proceeded with the blessing of this Court, which regarded Black people “as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far

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<sup>18</sup> Washington, *supra* note 7, at 66.

<sup>19</sup> Roberts, *supra* note 11, at 54.

<sup>20</sup> *George v. State*, 37 Miss. 316, 317 (Miss. Err. & App. 1859); *see also id.* (“The regulations of law, as to the white race, on the subject of sexual intercourse, do not and cannot, for obvious reasons, apply to slaves; their intercourse is promiscuous.”).

<sup>21</sup> A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process* 42–45 (1978).

<sup>22</sup> *M’Vaughers v. Elder*, 4 S.C.L. (2 Brev.) 307, 314 (1809).

inferior, that they had no rights which the white man was bound to respect.”<sup>23</sup>

In a nation that robbed them of any bodily autonomy, Black women nonetheless found ways to exercise some measure of dominion over their own bodies. Among the earliest acts of resistance by Black women was their “refus[al] to bring children into a world of interminable forced labor, where chains and floggings and sexual abuse for women were the everyday conditions of life.”<sup>24</sup> Southern doctors believed Black women “possessed of a secret by which they destroy the fetus at an early stage of gestation.”<sup>25</sup> The most common act of reproductive resistance was the use of “the infusion or decoction of tansy, rue, roots and seed, pennyroyal, cedar gum, and camphor” to “effect an abortion or to derange menstruation.”<sup>26</sup>

## B. Sexual Violence in Reconstruction

The end of the Civil War—in which more than one quarter of a million white men died in defense of white supremacy—brought the end of slavery. But it did not end the sexual terrorism against Black women. Sexual violence “was a critical element of the terrorization that took place across the South” as a

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<sup>23</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857), superseded (1868).

<sup>24</sup> Davis, *supra* note 13, at 184.

<sup>25</sup> Roberts, *supra* note 11, at 78.

<sup>26</sup> *Id.*

backlash to Reconstruction.<sup>27</sup> The Ku Klux Klan and other white terrorist organizations employed “group rape” as an “uncamouflaged political weapon in the drive to thwart the movement for Black equality.”<sup>28</sup> In the 1866 massacres in Memphis and New Orleans, white mobs “raped, singly and in groups, the Black women whose paths they crossed.”<sup>29</sup> Ida B. Wells declared in 1892 that “the rape of helpless Negro girls, which began in slavery days, still continues without reproof from church, state, or press.”<sup>30</sup>

While rape was an “act of physical violence designed to stifle Black women’s will to resist,”<sup>31</sup> they nonetheless resisted. Black women “reclaimed their bodies and their humanity by testifying about their assaults” in public forums—including before Congress.<sup>32</sup> In the aftermath of the 1866 riots, “numerous Black women testified before a Congressional committee about the savage mob rapes they had suffered.”<sup>33</sup> When Congress launched an investigation into Reconstruction violence in 1871, hundreds of Black women—“at great risk of reprisal”—testified

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<sup>27</sup> Shawn Leigh Alexander, *Reconstruction Violence and the Ku Klux Klan Hearings* 11 (2005).

<sup>28</sup> Davis, *supra* note 13, at 158.

<sup>29</sup> *Id.* at 68.

<sup>30</sup> Danielle L. McGuire, *At the Dark End of the Street: Black Women, Rape, and Resistance—A New History of the Civil Rights Movement* xix (2010).

<sup>31</sup> Roberts, *supra* note 11, at 52.

<sup>32</sup> McGuire, *supra* note 30, at xix.

<sup>33</sup> Davis, *supra* note 13, at 158.

under oath about the sexual assault and humiliation “designed to reinforce the idea that white men controlled the sexual dynamics of the South.”<sup>34</sup> Black women’s bravery thus ensured that as the debate raged regarding the meaning of “liberty” after centuries of enslavement, Congress—in enacting the Reconstruction Amendments and the Enforcement Acts—understood “the specific terrors that [they] experienced at the hands of white men.”<sup>35</sup>

### C. Compulsory Sterilization

The turn of the twentieth century brought a new threat to Black women’s reproductive freedom that was both “invasive and permanent: compulsory surgical sterilization.”<sup>36</sup> Indiana passed the nation’s first law requiring the sterilization of “the mentally unfit” in 1907, and by 1935, 27 states mandated sterilization of “the feeble-minded, those on welfare, or those with genetic defects.”<sup>37</sup> Black women “have always been staggeringly overrepresented in the ranks of the sterilized.”<sup>38</sup> For instance, of the 8,000 mentally disabled persons sterilized by the North Carolina Eugenic Commission in the 1930s, 5,000 were Black.<sup>39</sup> And by 1983, when Black people represented just 12 percent

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<sup>34</sup> Alexander, *supra* note 27, at 11.

<sup>35</sup> *Id.*

<sup>36</sup> Washington, *supra* note 7, at 279.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 281.

<sup>39</sup> *Id.*

of the population, 43 percent of the women sterilized in federally funded programs were Black.<sup>40</sup>

It is estimated that between 100,000 and 150,000 Black women have been sterilized by government-backed programs using federal funds.<sup>41</sup> In Mississippi, the practice of surgically sterilizing Black women without their knowledge was so common that it earned its own name—the “Mississippi appendectomy.”<sup>42</sup> Fannie Lou Hamer, founder of the Mississippi Freedom Democratic Party, reported that by 1965, 60 percent of the Black women in Sunflower County, Mississippi, had been sterilized without their consent.<sup>43</sup>

Compulsory sterilization was an outgrowth of negative eugenics—“the weeding out of undesirable social elements by discouraging or preventing the birth of children with ‘bad’ genetic profiles.”<sup>44</sup> Eugenics, building on the racist beliefs used to justify slavery, labeled Black women “as sexually indiscriminate and as bad mothers who were constrained by biology to give birth to defective children.”<sup>45</sup> White women, by contrast, were encouraged to have more children to

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 282.

<sup>43</sup> Roberts, *supra* note 11, at 145.

<sup>44</sup> Washington, *supra* note 7, at 264.

<sup>45</sup> *Id.* at 265.

maintain superior genetics in the American population.<sup>46</sup>

These blatantly racist ideas were not confined to rogue scientists or private actors; they were expressly embraced by the president and this Court. In 1905, President Theodore Roosevelt proclaimed that “race purity must be maintained.”<sup>47</sup> A year later, Roosevelt chastised “well-born white women who engaged in ‘willful sterility—the one sin for which the penalty is national death, race suicide.’”<sup>48</sup> Twenty years later, this Court rejected a constitutional challenge to forced sterilization and endorsed negative eugenics. Justice Oliver Wendell Holmes, a dedicated eugenicist, wrote:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.<sup>49</sup>

The law thus endorsed both forced procreation and forced sterility for Black women. “While slave masters forced Black women to bear children for profit, [eugenicist] policies sought to reduce Black

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<sup>46</sup> *Id.*

<sup>47</sup> Davis, *supra* note 13, at 187–88.

<sup>48</sup> *Id.* at 188.

<sup>49</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

women’s fertility.”<sup>50</sup> The common theme was government-backed control of Black women’s childbearing “to achieve social objectives.”<sup>51</sup>

#### D. Reproductive Freedom

The rise of the eugenics movement coincided with the rise of feminist “calls for ‘voluntary motherhood’—that is, the ability, given the real dangers that childbirth posed, to allow women to better control when and how they became pregnant.”<sup>52</sup> Voluntary motherhood depended on access to effective birth control, “individual choice, safe contraceptive methods, as well as abortions when necessary.”<sup>53</sup> The ability to control whether to give birth is a fundamental component of freedom for all women. But for Black women, whose procreation had been forced, monetized, and monitored since they arrived on American shores, access to birth control represented a unique form of liberty.

Much ink has been spilled debating the motives of early proponents of birth control, such as Margaret Sanger, the white founder of Planned Parenthood who joined forces with eugenicists in promoting family planning to Black women. At the other end of the spectrum were Black men such as Marcus Garvey,

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<sup>50</sup> Roberts, *supra* note 11, at 93.

<sup>51</sup> *Id.*; see also Washington, *supra* note 7, at 283.

<sup>52</sup> Melissa Murray, *Race-Ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 Harv. L. Rev. 2025, 2038 (2021).

<sup>53</sup> Davis, *supra* note 13, at 182.

founder of the Universal Negro Improvement Association, who “decried birth control as ‘race suicide.’”<sup>54</sup>

But whatever the motives and beliefs of white feminists and some Black men, Black women embraced the reproductive freedom that birth control offered. Black women, after all, had since slavery used “centuries-old African folk knowledge about contraceptives and abortifacients.”<sup>55</sup> After emancipation and through the early nineteenth century, Black women “gain[ed] increasing control of their fertility” through these methods.<sup>56</sup> To gain access to safer contraceptive methods, and guided by their concern for racial justice and their own health, Black women “distinguished their understanding of birth control from the dominant conception linked to eugenic thinking and practice.”<sup>57</sup>

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<sup>54</sup> Jill C. Morrison, *Resuscitating the Black Body: Reproductive Justice As Resistance to the State’s Property Interest in Black Women’s Reproductive Capacity*, 31 *Yale J.L. & Feminism* 35, 38 (2019).

<sup>55</sup> Loretta J. Ross, *African-American Women and Abortion: A Neglected History*, 3 *J. of Health Care for the Poor and Underserved* 274, 276 (1992).

<sup>56</sup> *Id.* at 277.

<sup>57</sup> Roberts, *supra* note 11, at 132. Black women are often required to exercise such discernment. For instance, Black women, like all American women, receive gynecological care. But much of the modern practice of gynecology is based on the work of virulent racist Dr. Marion Sims, who built his practice from “the gruesome reality in which each surgical scene was a violent struggle between the slaves and physicians and each woman’s body was a bloodied battleground. Each naked, unanesthetized slave woman had to be forcibly restrained by the other physicians through her shrieks of agony as Sims determinedly sliced,

Birth control, which includes the availability of safe abortions, was therefore not “thrust upon reluctant [Black women] by a population-control establishment anxious to control black fertility.”<sup>58</sup> Black women embraced birth control as a way “to reduce their dreadful maternal and infant death rates, preserve their new economic independence, and improve their standard of living.”<sup>59</sup> In nearly all-Black Harlem, for instance, the maternal and infant mortality rates were double those in other sections of New York.<sup>60</sup>

In addition to the dangers of childbirth, Black women were intimately “familiar with the murderously clumsy scalpels of inept abortionists seeking profit” from illegal abortions.<sup>61</sup> In New York, prior to the decriminalization of abortions, Black and Puerto Rican women accounted for 80 percent of deaths caused by illegal abortions.<sup>62</sup> Access to safe birth control allowed Black women to avoid life-threatening

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then sutured her genitalia. The other doctors, who could, fled when they could bear the horrific scenes no longer. It then fell to the women to restrain one another.” Washington, *supra* note 9, at 9. For the sake of their health, Black women have had to distinguish the benefits of gynecology from its racist origins. So too here.

<sup>58</sup> Ross, *supra* note 55, at 277.

<sup>59</sup> Roberts, *supra* note 11, at 135.

<sup>60</sup> *Id.*

<sup>61</sup> Davis, *supra* note 13, at 183

<sup>62</sup> *Id.*

conditions and procedures and to exercise choice—a liberty they had never fully enjoyed.

While “white eugenicists promoted birth control as a way of preserving an oppressive social structure,” Black women “promoted birth control as a way of toppling it.”<sup>63</sup> Black women never supported birth control “as a means of eliminating hereditary defects,” but instead used it to address poor health outcomes that “resulted from social and economic barriers.”<sup>64</sup> Most importantly, birth control permitted Black women to exercise procreative liberty, which the law had denied them for so long.

## **II. Mississippi’s Abortion Ban Will Disproportionately Harm Black Women And Women Experiencing Poverty**

Throughout the American history recounted above, Mississippi has heaped abuse upon abuse on the reproductive freedom of Black women. It refused legal protection to Black girls and women who were raped during slavery, forcing them to bear the children of their rapists.<sup>65</sup> It was the home of the “Mississippi appendectomy,” permanently robbing Black women of their fertility. Its Legislature has made the

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<sup>63</sup> Roberts, *supra* note 11, at 138.

<sup>64</sup> *Id.* at 139.

<sup>65</sup> *George v. State*, 37 Miss. 316, 317 (Miss. Err. & App. 1859) (holding that laws against sexual assault “do not and cannot, for obvious reasons, apply to slaves; their intercourse is promiscuous.”).

reproductive choices of women—particularly Black women—a consistent topic of debate.

In 1958, for example, Mississippi’s Legislature debated mandatory sterilization for any unmarried mother who gave birth to a second “illegitimate” child, with one legislator noting that “the negro woman, because of child welfare assistance, [is] making it a business, in some cases of giving birth to illegitimate children.”<sup>66</sup> It is clear that women’s health has not been the impetus for these debates; it is instead Mississippi’s effort to regulate Black women’s procreation to achieve its social objectives.

Now, citing its concern for maternal health, Mississippi asks this Court to destroy all constitutional protection of women’s right to choose whether to carry a pregnancy to term. But Mississippi’s ban on abortion does not serve its purported interest of protecting maternal health. It instead ignores disparate health outcomes and access to health care by Black women in the state. It also gives short shrift to the fact that this disparity likely drives many women to choose an abortion rather than undergo a pregnancy that may put them at risk of death. In so doing, the law strips the very women most affected by it of the right to assert the autonomy to make the choices that will best serve what they know to be their own best interest in protecting their maternal and reproductive health.

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<sup>66</sup> Roberts, *supra* note 11, at 334.

**A. Mississippi’s Abortion Ban Robs Black Women of Reproductive Choice to Avoid Increased Pregnancy-Related Health Risks Due to Lack of Adequate Healthcare**

One of the primary motivations for Black women’s initial embrace of reproductive choice was their concern for “high maternal and infant mortality rates that resulted from social and economic barriers.”<sup>67</sup> Little has changed. Today, Black women are three to four times more likely to die during or after childbirth than white women.<sup>68</sup> They are also more likely to experience “near misses”—barely escaping death—during and after delivery.<sup>69</sup> Of these deaths and near misses, almost half result from preventable causes.<sup>70</sup> And this heightened risk exists regardless of social, economic, or education level.<sup>71</sup> “Put simply, for [B]lack women far more than for white women, giving birth can amount to a death sentence.”<sup>72</sup>

Much of this stems from the fact that racial disparities in healthcare—both in terms of access to and

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<sup>67</sup> Roberts, *supra* note 11, at 41.

<sup>68</sup> Amy Roeder, *America is Failing its Black Mothers*, Harv. Pub. Health Rev. (2019), <https://perma.cc/V3RL-PD8K>.

<sup>69</sup> Jamila Taylor, *Structural Racism and Maternal Health Among Black Women*, 48 J. of L., Med., & Ethics 506, 506 (2020).

<sup>70</sup> Roeder, *supra* note 68.

<sup>71</sup> Taylor, *supra* note 69, at 507.

<sup>72</sup> Roeder, *supra* note 68.

quality received—have long-existed.<sup>73</sup> These disparities stem from an assortment of factors including “stresses associated with poor living conditions, environmental injustice, poverty, residing in food deserts, and implicit bias in the medical setting, and may be compounded by existing medical conditions.”<sup>74</sup> The disparities are also intimately connected to the historical subjugation of Black women that has been endemic in this country.<sup>75</sup>

Such disparities are particularly acute in Mississippi. From 2013 to 2016, Mississippi reported a pregnancy-related mortality ratio for Black women of 51.9 deaths per 100,000 live births.<sup>76</sup> This number was

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<sup>73</sup> See *Racial Disparities in Maternal Health Have Widened Since 1980s, Federal Report Says*, Mod. Healthcare (Sept. 15, 2021), <https://perma.cc/F76J-FTWE>; see also Jamila Taylor, *Racism, Inequality, and African Americans*, Century Found. (Dec. 19, 2019), <https://perma.cc/S6QP-GCPT> (“[D]isparities [] exist across health conditions when comparing African Americans and whites, including maternal mortality, infant mortality, heart disease, diabetes, cancer, and other health issues.”).

<sup>74</sup> Michele Goodwin, *Women on the Frontlines*, 106 Cornell L. Rev. 851, 860 (2021).

<sup>75</sup> See, *supra*, Part I; see also Taylor, *supra* note 69 (discussing “how racism has been integrated into the structures of society, including public policies, institutional practices, and cultural representations that reinforce racial inequality, particularly as it pertains to maternal health.”).

<sup>76</sup> Miss. Dep’t of Health, *Mississippi Maternal Mortality Report*, 2013–2016, at 5 (Apr. 2019), <https://perma.cc/ZCX4-GHRV> (A pregnancy related death is defined as any “death of a woman while pregnant or within 1 year of the end of a pregnancy—from any cause related to or aggravated by the pregnancy or its management, but not from accidental or incidental causes.”) (hereinafter “Mississippi Maternal Mortality Report”).

approximately three times higher than that of white women in the state who still were reported to have a pregnancy-related mortality ratio of 17.3 deaths per 100,000 live births.<sup>77</sup> Cardiovascular conditions and hypertensive disorders were the most common cause of these pregnancy-related deaths in Mississippi,<sup>78</sup> both of which Black women experience at much higher rates than white women.<sup>79</sup>

Due to this high risk of pregnancy-related death, receiving an abortion can be a much safer option than carrying a pregnancy to term, especially among women who lack access to healthcare or who already have medical issues. A recent study found that banning abortions nationwide would result in a 21 percent increase in the number of pregnancy-related deaths overall and a 33 percent increase among Black women.<sup>80</sup>

Whatever interest Mississippi claims in protecting maternal health should not outweigh the demonstrated risks pregnancy can have—especially on Black women. To hold otherwise would “reflect[] centuries-old patterns of control and bargaining over

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<sup>77</sup> *Id.* at 5.

<sup>78</sup> *Id.* at 4.

<sup>79</sup> Nat’l P’ship for Women and Families, *Black Women’s Maternal Health: A Multifaceted Approach to Addressing Persistent and Dire Health Disparities* 1 (Apr. 2018), <https://perma.cc/PG5J-EPAZ> (hereinafter “Black Women’s Maternal Health”).

<sup>80</sup> Lisa Marshall, *Study: Banning Abortion Would Boost Maternal Mortality By Double Digits*, CU Boulder Today (Sept. 8, 2021), <https://perma.cc/6MWG-8A5M>.

[their] reproductive autonomy” that “denies the dignity to govern their bodies and families.”<sup>81</sup>

### **B. Mississippi Refuses to Provide the Resources Necessary to Protect the Health of Black Women**

Mississippi’s stated concern for maternal health is belied by its refusal to seriously address the health disparities for Black and economically disadvantaged women. “Mississippi ranks last, or close to last, in almost every leading health outcome.”<sup>82</sup> And “these health disparities are significantly worse for those who have systematically faced obstacles to health due to their socio-economic status, race . . . and other characteristics historically linked to discrimination or exclusion.”<sup>83</sup> Nearly 40 percent of the population of Mississippi is Black,<sup>84</sup> and nearly 20 percent of the women in the state live below the poverty line compared to 12 percent nationally;<sup>85</sup> so, it is no surprise that the state’s dismal health outcomes are disproportionately borne by Black women.

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<sup>81</sup> Goodwin, *supra* note 74.

<sup>82</sup> Miss. St. Dep’t of Health, *Health Equity in Mississippi*, <https://perma.cc/5GP6-HFCC> (last visited Sept. 14, 2021).

<sup>83</sup> *Id.*

<sup>84</sup> U.S. Census Bureau, *Quick Facts Mississippi*, <https://perma.cc/QJ9J-DFET> (last visited Sept. 14, 2021).

<sup>85</sup> Nat’l Women’s L. Ctr., *Mississippi*, <https://perma.cc/6NP3-QBFS> (last visited Sept. 14, 2021) (hereinafter “*Mississippi*”).

In the face of this reality, Mississippi has failed to provide the resources necessary to protect the health of women and instead erects barriers that keep them from making choices that could potentially save their lives. For example, the Mississippi Legislature recently refused to expand postpartum Medicaid beyond the sixty days required by federal law to a full year, as recommended by many maternal-health experts.<sup>86</sup> It did so even though 86 percent of maternal deaths in Mississippi occur postpartum, and most of those deaths occur after the 60-day Medicaid coverage period has ended.<sup>87</sup>

Additionally, a disproportionate rate of Black women in the State rely on Medicaid: 37.6 percent compared to 15.7 percent of white women.<sup>88</sup> Mississippi's failure to expand Medicaid also left nearly 45,000 women, including 20,000 Black women, without health insurance.<sup>89</sup> Whether a woman has insurance has a demonstrable impact on her health during a potential pregnancy and on the outcome of the pregnancy. Women who lack insurance are less likely to

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<sup>86</sup> Michael Ollove, *States Push to Extend Postpartum Medicaid Benefits to Saves Lives*, Pew (May, 5, 2021), <https://perma.cc/W799-NEZY>.

<sup>87</sup> Ctr. for Miss. Health Pol'y, *Postpartum Medicaid Issue Brief 1* (Feb. 2021), <https://perma.cc/3BTX-R7N4>.

<sup>88</sup> Kaiser Family Found., *Medicaid Coverage Rate for the Nonelderly by Race/Ethnicity*, <https://perma.cc/9BRG-9HU2> (last visited Sept. 15, 2021).

<sup>89</sup> Nat'l Women's L. Ctr. & Miss. Black Women's Round Table, *Women Driving Change: A Pathway to a Better Mississippi* 49, <https://perma.cc/ZH3H-8THB> (hereinafter "Women Driving Change").

receive prenatal care during the first several months of pregnancy or will sometimes forgo that care completely.<sup>90</sup> The lack of such care increases the chance of both infant and maternal mortality,<sup>91</sup> both of which are markedly high in Mississippi especially for Black women and children.<sup>92</sup> These numbers undermine Mississippi's purported interests supporting its ban on abortion.

In addition to denying tens of thousands of women the ability to access reproductive care through increased insurance access, Mississippi has made it incredibly difficult for women to obtain an abortion—one of the few options that remain to avoid the increased risks of continuing with a pregnancy. There is only one clinic providing abortion in the entire state, resulting in 91 percent of the state's women living in a county that does not provide abortion care or services.<sup>93</sup> In addition, Mississippi imposes burdensome restrictions on women seeking abortions including state-directed counseling designed to discourage a woman from choosing an abortion, a 24-hour waiting

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<sup>90</sup> Nat'l P'ship for Women and Families, *Black Women Experience Pervasive Disparities in Access to Health Insurance* (Apr. 2019), <https://perma.cc/6JDT-AC5Y>.

<sup>91</sup> *Id.*

<sup>92</sup> Mississippi Maternal Mortality Report, *supra* note 76, at 5; *see also*, Nat'l Ctr. for Health Stat., *Infant Mortality Rates by State*, <https://perma.cc/JK8U-ZDFT> (last visited Sept. 14, 2021) (Mississippi has the highest infant mortality rate in the nation: 9.07 deaths per 1,000 births).

<sup>93</sup> P.R. Lockhart, *Mississippi's New Abortion Ban Will Hit Black Women the Hardest*, VOX (Mar. 23, 2018), <https://perma.cc/8GBF-NM55>.

period after counseling is provided, and a prohibition on telemedicine to provide those counseling services.<sup>94</sup>

This combination of restrictions requires women to make multiple trips to the only clinic in the state to obtain an abortion. Such travel imposes great costs on women seeking an abortion because the ability to travel depends heavily on a woman's socioeconomic status, access to transportation, availability of child-care, and the ability to take time off from work. Most women seeking abortion care are economically disadvantaged<sup>95</sup> and must travel long distances,<sup>96</sup> making multiple trips a significant barrier preventing them from seeking timely and safe abortions. One Mississippi activist noted that, in the context of

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<sup>94</sup> Guttmacher Inst., *State Facts About Abortion: Mississippi*, <https://perma.cc/R6QA-KKT3> (last visited Sept. 15, 2021); Mississippi law also requires counselors to provide untrue information indicating that abortion is linked to breast cancer, further demonstrating lack of commitment to meaningfully addressing women's health. See, ACLU Mississippi, *Know Your Rights*, <https://perma.cc/Y3P5-E9UK> (last visited Sept. 14, 2021).

<sup>95</sup> In 2014, three-fourths of abortion patients were low income, with 49 percent living at less than the federal poverty line. Jenna Jerman, Rachel K. Jones & Tsyoshi Onda, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Inst. (May 2016), <https://perma.cc/K9ZB-LCHM>.

<sup>96</sup> See Guttmacher Inst., *Mississippi is Attacking Roe v. Wade Head On, the Consequences Could Be Severe* (Aug. 17, 2021), <https://perma.cc/NAF6-CFJY> ("If abortion were banned in Mississippi—and only Mississippi—the average driving distance for a woman of reproductive age to reach any abortion clinic would increase 42 percent—from 78 miles to 111 miles each way.").

Mississippi's 15-week ban, "[t]aking away [even] a week will mean more women we will need [to get] help in-state and more people we will need to refer out of state."<sup>97</sup>

Black women disproportionately fall into the group of women for whom these burdens are multiplied due to barriers imposed by the state on low-income women. In Mississippi, over one-third of the Black population lives below the poverty line.<sup>98</sup> For Black women alone, this number jumps to 36.2 percent.<sup>99</sup> Part of this stems from the fact that Black women in Mississippi make only .52 cents per dollar a man makes.<sup>100</sup> It also flows from the reality that Black women make up over half of the women working low-wage jobs, one-quarter of whom live in poverty.<sup>101</sup> And, of the women working low-wage jobs living in poverty in Mississippi, 63 percent of them are Black.<sup>102</sup>

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<sup>97</sup> Lockhart, *supra* note 93.

<sup>98</sup> Kaiser Family Found., *Poverty Rate by Race/Ethnicity*, <https://perma.cc/CM2P-3EIJ> (last visited Sept. 15, 2021).

<sup>99</sup> Women Driving Change, *supra* note 89, at 5.

<sup>100</sup> *Mississippi*, *supra* note 85.

<sup>101</sup> Women Driving Change, *supra* note 89, at 14.

<sup>102</sup> *Id.* at 15.

### C. Mississippi’s Refusal to Include an Exception for Rape Victims Is Indefensible and Contrary to the Ban’s Purported Purpose of Protecting Women

Perhaps the clearest—and least defensible—signal that Mississippi’s abortion ban is not motivated by concern for women’s health is the state’s failure to make any exception for women made pregnant by rape or incest. The refusal to protect women from the devastating health effects of being forced to continue a pregnancy made by force is particularly vile given Mississippi’s historical failure to protect Black women from sexual violence.<sup>103</sup> The Ban prohibits all abortions after 15 weeks’ gestation except for “medical emergency”<sup>104</sup> or “in cases of severe fetal

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<sup>103</sup> See Section I.A, *supra*. Mississippi’s abhorrent history with respect to Black rape victims did not end with slavery. By the 1950s, one activist estimated that 75 percent of the Black girls and women in Greenwood, Mississippi had been sexually abused by white men. McGuire, *supra* note 30, at 203. During the Civil Rights Movement of the 1960s, Black women arrested as part of protests in Jackson, Mississippi were regularly “raped by attendants at the jails” and forced to undergo “unsanitary and unmedical [*sic*] vaginal exams.” *Id.* at 195. Between 1940 and 1965, only ten white men were convicted of raping Black women, though such crimes “happened regularly.” *Id.* at 209. Mississippi’s decision to rob rape victims of reproductive choice is especially vile given this history.

<sup>104</sup> The Ban defines “medical emergency” as a “condition in which, on the basis of the physician’s good faith clinical judgment, an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-threatening physical condition arising from the pregnancy itself, or where the continuation of the pregnancy will create a serious risk of substantial

abnormality.”<sup>105</sup> The Ban does not, however, provide the same exemptions to pregnancies conceived from rape or incest.

Andy Gipson, a former Republican Member of the Mississippi House of Representatives and Chairman of the Judiciary B Committee, insists the Ban is “a commonsense balance between the needs of constituents and the need to protect life.”<sup>106</sup> The legislature claims the Ban seeks to “protect the life and health of pregnant mothers,”<sup>107</sup> citing “significant” mental health consequences following the termination of a pregnancy after 15 weeks’ gestation: depression, anxiety, substance abuse, and “other emotional or psychological problems.”<sup>108</sup>

Representative Gipson’s February 2018 remarks cement the Mississippi Legislature’s paternalistic spin:

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and irreversible impairment of a major bodily function.” Miss. Ann. Code § 41-41-191(3)(j).

<sup>105</sup> The Ban defines “severe fetal abnormality” as a “life-threatening physical condition that, in reasonable medical judgment, regardless of the provision of life-saving medical treatment, is incompatible with life outside the womb.” Miss. Ann. Code § 41-41-191(3)(h).

<sup>106</sup> Mississippi College School of Law, Legislative History Project, Video of Adoption of H.B. 1150, 2:56 to 3:12, (2018) (statement of Representative Andy Gipson), <https://perma.cc/T6T7-MP3C>.

<sup>107</sup> *Id.* at 5:10 to 5:16.

<sup>108</sup> Miss. Ann. Code § 41-41-191(b)(ii), (iv).

[The Ban] would protect a pregnant woman’s health from the increased risk of physical and emotional harm that comes with later term abortions. *We believe that women deserve real health care, and this law is going to ensure that women are not put at greater risk of death, illness, or psychological trauma* as a result of these late term abortions.<sup>109</sup>

According to Representative Gipson, the antithesis of “real healthcare” is “fake health care . . . involving the destruction of life . . . and the woman’s health [which] this bill protects.”<sup>110</sup> But the Ban’s proponents undermine their own position, later stating “this is only about abortion; this is not about maternal health care.”<sup>111</sup>

The Mississippi Legislature’s assertion that the Ban seeks to “protect women” are disingenuous at best. The Ban also callously disregards the intimate connection between physical and psychological health,<sup>112</sup> and the critical needs of women who survive

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<sup>109</sup> Video of Adoption of H.B. 1150, *supra* note 106, at 0:25 to 0:50 (emphasis added).

<sup>110</sup> *Id.* at 12:11 to 12:24; *see also* Mississippi College School of Law, Legislative History Project, Video of House Concurring in Amend. From Senate of H.B. 1510, 21:36 (Mar. 8, 2018), <https://perma.cc/3MXN-WZ5D> (statement of Representative Gipson).

<sup>111</sup> Video of Adoption of H.B. 1150, *supra* note 106, at 21:06 to 21:10 (statement of Representative Becky Currie).

<sup>112</sup> *See, e.g.*, Kavitha Kolappa, David C. Henderson & Sandeep P. Kishore, *No Physical Health Without Mental Health: Lessons Learned?*, 91 Bull. World Health Org. 3-3A (2013),

sexual violence.<sup>113</sup> Despite several dissenting members of the Mississippi State Legislature expressing concern for rape survivors, former Chairman Gipson disagreed, citing the availability of rape kits as an apparent cure-all. According to him, “those situations”<sup>114</sup>—meaning, rape-related pregnancies—“are normally and customarily addressed earlier than fifteen weeks and so those exemptions [for rape and incest] do not exist in our 20-week ban and they don’t exist in our 15-week ban . . . .”<sup>115</sup>

To the contrary, the Mississippi State Legislature’s decision to omit an exception for rape-related pregnancies demonstrates its deeply misguided understanding of victims’ experiences in the aftermath of sexual assault. Survivors are left reeling with severe psychological pain that influences much of their lives.<sup>116</sup> Rape victims report a higher rate of serious and life-threatening psychological distress compared to victims of other crimes. Roughly 70 percent report moderate to severe distress—a larger percentage

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<https://perma.cc/5EKN-LNNN> (“[W]ithout mental health there can be no true physical health.”).

<sup>113</sup> Amicus acknowledges that men are also victims of sexual violence, however, the scope of this brief is restrained to the experiences of women.

<sup>114</sup> Video of House Concurring, *supra* note 110, 20:13 to 20:18, (statements of Representative Andy Gipson).

<sup>115</sup> *Id.* at 18:57 to 19:12, 19:29 to 19:39.

<sup>116</sup> RAINN, *Victims of Sexual Violence: Statistics*, <https://perma.cc/XT6C-954Q> (last visited Sept. 13, 2021) (hereinafter “*Victims of Sexual Violence*”).

than for any other violent crime.<sup>117</sup> They may also seriously contemplate<sup>118</sup> and attempt suicide more than other crime victims.<sup>119</sup>

Moreover, 94 percent experience post-traumatic stress disorder (PTSD) in the two weeks after they are sexually assaulted, 30 percent of which report persistent symptoms nine months after they are raped.<sup>120</sup> Many women report re-experiencing the event through flashbacks, dreams, or intrusive thoughts.<sup>121</sup> They may also suffer from major depressive episodes.<sup>122</sup> These symptoms, in addition to others, can cause them to feel as though they are in constant danger, making it difficult to perform daily functions.<sup>123</sup>

Because rape victims intentionally or subconsciously avoid situations that may force them to recall the assault and trigger psychological trauma,<sup>124</sup> it

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<sup>117</sup> *Id.*

<sup>118</sup> Nat'l Victim Ctr. & Crime Victims Res. and Treatment Ctr., *Rape in America: A Report to the Nation* 7 (Apr. 23, 1993), <https://perma.cc/DT65-KNXG> (this study concluded that rape victims were 4.1 times more likely) (hereinafter "RAPE IN AMERICA").

<sup>119</sup> *Id.* (concluding rape victims were 13 times more likely).

<sup>120</sup> *Victims of Sexual Violence*, *supra* note 116.

<sup>121</sup> RAINN, *Post-Traumatic Stress Disorder*, <https://perma.cc/SZJ5-CGG8> (last visited Sept. 13, 2021 (hereinafter "Post-Traumatic Stress Disorder").

<sup>122</sup> RAINN, *Depression*, <https://perma.cc/KUU2-E8KB> (last visited Sept. 13, 2021).

<sup>123</sup> *Post-Traumatic Stress Disorder*, *supra* note 121.

<sup>124</sup> *Id.*

should come as little surprise that rape remains the most underreported violent crime in the U.S.<sup>125</sup> This major barrier to reporting is compounded by the dismissive treatment by law enforcement,<sup>126</sup> privacy concerns, fear of retaliation, perception of insufficient evidence, lack of reporting knowledge, and confusion of whether the perpetrator had committed a crime or whether the harm was intentional.<sup>127</sup>

This sentiment applies to women seeking medical attention with equal force. Only 17 percent of rape victims receive a medical examination following the assault.<sup>128</sup> Of this small number, an astonishing 60 percent will not receive advice regarding pregnancy testing or how to prevent pregnancy.<sup>129</sup> A study published by the American Journal of Obstetrics and Gynecology concluded these factors ultimately delayed

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<sup>125</sup> Rape in America, *supra* note 118, at 5–6, Figure 7.

<sup>126</sup> J. Allison Strickland, *Rape Exceptions in Post-Webster Antiabortion Legislation: A Practical Analysis*, 126 Colum. J. L. & Soc. Probs. 163, 167–68 (1992) (“[I]t is widely accepted that reported rapes represent only a fraction of the total [amount of rapes] due in part to dismissal of such claims by law enforcement, and in part to under-reporting of the crime by victims.”); *see also* Susan H. Lewis, *Unspoken Crimes: Sexual Assault in Rural America* 5 (2003) (“In Mississippi, Renee points to a big problem with rural sheriffs who will not take sexual assault seriously; she quotes them as saying, ‘Honey, don’t worry about it!’”).

<sup>127</sup> Med. U. of S.C., *Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study* 2 (2007), <https://perma.cc/AV7F-GYFP>.

<sup>128</sup> Rape in America, *supra* note 118, at 5.

<sup>129</sup> *Id.*

the discovery of rape-related conception, finding that over 32 percent of these women did not know they were pregnant until their second trimester (12 to 26 weeks after the assault).<sup>130</sup>

While the Ban will impact all women in Mississippi, Black women are more likely to experience rape-related pregnancy, suffer intensified psychological harm, and are less likely to report their assault to authorities. Central to the safeguarding of Black women's health and reproductive equity is the right to bodily autonomy and the decision whether to continue or terminate a pregnancy. Thus, it is critical that Black women have access to safe and timely abortion care;<sup>131</sup> their lives could depend on it.<sup>132</sup>

According to several studies, Black women are more likely to be raped than American women overall

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<sup>130</sup> Melisa M. Holmes, MD, Heidi S. Resnick, PhD, Dean G. Kilpatrick, PhD, & Connie L. Best, PhD *Rape-Related pregnancy: Estimates and descriptive characteristics from a national sample of women*, 175 *Am. J. Obstet. & Gynecol.* 320, 322 (1996).

<sup>131</sup> See generally, *The Turnaway Study*, Univ. of Cal. S.F. Advancing New Standards in Reprod. Health, <https://perma.cc/VU64-9YUW>.

<sup>132</sup> A woman's ability to terminate a rape-related pregnancy is "vital to post-traumatic recovery from sexual assault." See J. Allison Strickland, *Rape Exceptions in Post-Webster Antiabortion Legislation: A Practical Analysis*, 126 *Colum. J. L. & Soc. Probs.* 163, 174 (1992). Additionally, most Black female homicide victims were murdered by current or former intimate partners (56 percent). See Inst. for Women's Pol'y Res., *The Status of Black Women in the United States* 121, <https://perma.cc/VS2H-GJRF> (hereinafter "Status of Black Women").

(21.2 percent versus 19.3 percent, respectively).<sup>133</sup> Black rape victims are also more likely to experience a rape-related pregnancy (three percent versus 2.4 percent, respectively).<sup>134</sup> The overwhelming number of perpetrators in cases where women experience a rape-related pregnancy are current or former intimate partners.<sup>135</sup> However, instances of rape where the victim is a Black woman are tragically underreported, requiring additional context for a more fulsome picture.<sup>136</sup> A deep distrust in law enforcement prevents Black women from reporting sexual violence to authorities.<sup>137</sup>

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<sup>133</sup> See, e.g., Matthew J. Brieding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization--National Intimate Partner and Sexual Violence Survey, United States, 2011*, CDC (Sept. 5, 2014), <https://perma.cc/A9FJ-QST9>; see also Susan Green, *Violence Against Black Women – Many Types, Far-reaching Effects*, Inst. for Women’s Pol’y Res., (July 13, 2017), <https://perma.cc/7W32-FLBA>; Status of Black Women, *supra* note 132.

<sup>134</sup> See Kathleen C. Basile et al., *Rape-Related Pregnancy and Association With Reproductive Coercion in the U.S.*, 55 *Am. J. Preventive Med.* 770 (2018).

<sup>135</sup> *Id.* (77.3 percent).

<sup>136</sup> For each Black woman that reports her rape to authorities, at least 15 do not. See Blackburn Ctr., *The Barriers That May Prevent Black Women From Reporting Sexual Assault* (Feb. 18, 2020), <https://perma.cc/A7AS-M954>.

<sup>137</sup> Michele R. Decker, Charvonne N. Holliday, Zaynab Hameeduddin, Roma Shah, Janice Miller, Joyce Dantzler & Leigh Goodmark, “*You Do Not Think Of Me as a Human Being*”: *Race and Gender Inequities Intersect to Discourage Police Reporting Against Women*, 96 *J. Urban Health* 772, 773–74 (2019)

Due to the racist and sexist history of oppression and discrimination unique to Black women discussed in Part I, mental health consequences following sexual violence are magnified, preventing them from effectively addressing their trauma.<sup>138</sup> Specifically, Black women experience exacerbated psychological distress compared to other rape victims, including worse depressive episodes, PTSD symptoms, and substance abuse.<sup>139</sup>

Black women are also more likely to experience higher rates of depression and anxiety<sup>140</sup> because they are disproportionately victims of intimate partner

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(concerns include fear of retaliation, minimization, and victim-blaming).

<sup>138</sup> The Nat'l Ctr. on Violence Against Women in the Black Cmty., *Black Women and Sexual Assault*, <https://perma.cc/HV9X-QJMD> (last visited Sept. 17, 2021).

<sup>139</sup> Thema Bryant-Davis, Sarah E. Ullman, Yuying Tsong, Shaquita Tillman & Kimberly Smith, *Struggling to Survive: Sexual Assault, Poverty, and Health Outcomes of African American women*, 80 *Am. J. Orthopsychiatry* 1, 3–4 (2010).

<sup>140</sup> Women who are sexually assaulted by an intimate partner suffer higher rates of depression and anxiety than women sexually abused by a non-intimate partner. Nat'l Coalition Against Domestic Violence, *Domestic Violence and Sexual Assault*, <https://perma.cc/XD3H-BVFT> (last visited Sept. 15, 2021).

violence,<sup>141</sup> including rape<sup>142</sup> and reproductive coercion.<sup>143</sup> Finally, victims of both rape and domestic violence are more likely to remain with abusive partners if they are unable to terminate a pregnancy,<sup>144</sup> and they are less likely to report the partner-perpetrator.<sup>145</sup>

The rape of Black women has persisted throughout our nation's history. The Ban will serve to deprive rape victims of bodily autonomy and reproductive freedom, continuing the impact of generational trauma. This issue is compounded by the intersection of race, gender, and class.

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<sup>141</sup> More than 40 percent of Black women report intimate partner violence in their lifetimes (41.2 percent), compared with 31.5 percent of all other American women. See Asha DuMonthier, Chandra Childers & Jessica Milli, *The Status of Black Women in the United States*, Inst. for Women's Pol'y Res. (2017), <https://perma.cc/26SM-KJ3F>.

<sup>142</sup> 7.4 percent of Black women report having been raped by their partner. See Carolyn M. West & Kalimah Johnson, *Sexual Violence in the Lives of African American Women*, Nat'l Online Res. Ctr. on Violence Against Women (Mar. 2013), <https://perma.cc/27F2-95YR>.

<sup>143</sup> Basile, *supra* note 134.

<sup>144</sup> *The Turnaway Study*, *supra* note 131.

<sup>145</sup> Reporting barriers include fear of retaliation by the perpetrator, their family, and their shared community can prevent disclosure. See Decker, *supra* note 137.

**CONCLUSION**

This Court should affirm the decision of the Fifth Circuit Court of Appeals and once again affirm a woman's right to terminate her pregnancy.

Respectfully submitted,

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