

## Executive Summary

This memorandum was produced by ASAN in response to Justice Samuel Alito's leaked draft opinion in *Dobbs v. Jackson Women's Health Organization*. The memo's introduction explains the potential implications if the final opinion in *Dobbs* is much the same as the leaked draft and highlights some rights important to the disabled community that could be in danger.

Justice Alito's *Dobbs v. Jackson* opinion is based on his disagreement with a series of landmark Supreme Court decisions which began with *Griswold v. Connecticut*, including *Roe v. Wade*. This line of cases contains decisions that our current civil rights depend on. This is because the Supreme Court has held that the Constitution's guarantee of "liberty" includes many rights that are not explicitly in the text of the Constitution. The Court has described these fundamental human and civil rights in terms of a right to privacy. This right to privacy protects individuals from governmental interference in matters of bodily autonomy and certain personal decisions.

The decision in *Roe* makes references to other cases that involve privacy rights and the Due Process Clause of the Fourteenth Amendment, such as *Griswold* and *Loving v. Virginia*. *Roe* was followed by another case, *Planned Parenthood v. Casey*, in 1992. The opinion in *Casey* set more boundaries for abortion rights. Today, *Roe* and *Casey* set a minimum standard for legal abortion in the United States. *Roe* and *Casey* have also been used in other Supreme Court decisions that deal with the right to privacy. They are key parts of the set of cases that define the limits of privacy rights that individuals can assert against governmental interference in their lives.

The leaked draft also undermines the legal doctrine known as *stare decisis*. The doctrine states that courts should follow the rules established in previous cases, rather than overturning them, as much as possible. *Stare decisis* is important in our legal system because it provides stability. When courts follow their previous decisions, and the decisions of courts above them, when they rule on cases like those that have already been decided, the legal consequences of behavior are predictable. This makes laws, rights, and obligations clear to the general public. It allows lawyers to give reliable advice to their clients. It allows individuals to plan their lives and make decisions. Without *stare decisis*, the law could change abruptly.

The draft opinion takes aim at the reasoning used to decide *Roe*, *Casey*, and many other cases, reasoning that governs the constitutional right to privacy, autonomy, and making personal choices. By rejecting decades of decisions about what the Fourteenth Amendment means and weakening *stare decisis*, the draft endangers fundamental rights, particularly those of marginalized people. The federal constitutional rights to marriage and sexual intimacy increasingly protect people long denied such basic human rights, especially LGBTQIA+ people, people with disabilities, racialized communities, and other marginalized groups. These rights are among the most contested for people with disabilities, who are often denied equal access to marriage and intimacy. The draft puts decades of legal gains regarding these rights – and the

hope for future progress – under threat. The present form of the draft opinions invites legal challenges to the right to privacy that will curtail marriage and intimacy rights, including the right to contraception.

The leaked draft also threatens the right to privacy in many other areas of life, such as the medical context and decisions about family living arrangements. Cases threatened by the leaked draft govern the federal constitutional right to autonomy in health care choices, including the right to accept or refuse care, the right not to be sterilized against one's will, some aspects of the right to keep medical information private, and the right to family living arrangements of one's choice. Autonomy in health care and housing are also critical and contested rights for many marginalized people, including people with disabilities.

The leaked *Dobbs v. Jackson* draft opinion will have devastating consequences unless it is significantly altered before it is released. By drastically narrowing the scope of rights protected by the Fourteenth Amendment's Due Process Clause and eviscerating *stare decisis*, the draft has consequences far beyond abortion. It may affect personal rights surrounding marriage, intimacy, sterilization, medical care, housing, speech, and more. To protect our communities, we must unite in our opposition to this opinion and its unjust result.

## **Introduction**

Justice Alito's leaked draft opinion in *Dobbs v. Jackson Women's Health Organization* should alarm everyone interested in the constitutional rights to work, marry, have and raise children, and make personal decisions without governmental interference. The rationale outlined in the draft can be easily applied to these rights, something the language used in the draft implies. Because these rights are crucial and have been historically and are currently contested for people with disabilities, the draft opinion will severely curtail the rights of marginalized people, including disabled folks, across the country, if released in its present form.

If the final *Dobbs* opinion is substantially like the leaked draft, opponents of civil rights and liberties will bring further cases in hopes that federal courts apply its flawed reasoning to other rights. The current reasoning in *Dobbs* would eviscerate all federal privacy rights that are not explicitly stated in text of the Constitution and its Amendments unless those rights were widely acknowledged when the Fourteenth Amendment was passed. The Fourteenth Amendment came about in the 1860s. The rights at issue include marriage equality, the right to refuse medical treatment, and the right to bodily autonomy. All of these rights, and more, are key to the life and experiences of the disabled community.

This memorandum outlines the structure of Justice Alito's draft opinion and its potential impact on privacy rights. It is subdivided according to the issues and rights potentially affected.

## **The *Dobbs v. Jackson* Draft Opinion**

At the core of Justice Alito's *Dobbs v. Jackson* opinion is his disagreement with a series of landmark Supreme Court decisions which began with *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Griswold* is the immediate predecessor of *Roe v. Wade*, 410 U.S. 113, 153-55 (1973). The line of cases descending from *Griswold* contains numerous other important civil rights decisions. *Griswold* is also a descendant of older decisions stretching back at least into the early 20th century. It is the culmination of a gradual expansion in individual liberty in personal decision-making that binds the bits and pieces of rights to make certain choices without government interference articulated in these older cases into a comprehensive right to privacy.<sup>1</sup>

In *Griswold*, the Supreme Court ruled that married couples could freely use contraceptives because their conduct as a couple was within a "zone of privacy created by several fundamental constitutional guarantees[.]" 381 U.S. at 484. By "zone of privacy," the Court meant that there was a series of rights not explicitly mentioned in the Constitution but implicitly part of it, largely because the Fourteenth Amendment guarantees that the States cannot "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend XIV, § 1. This clause of the Fourteenth Amendment is known as the Due Process Clause. The Supreme Court later decided *Roe* mainly on the basis of the Due Process Clause. Ever since *Griswold*, federal courts have considered a series of fundamental rights to be part of the Due Process Clause's guarantee of access to "life, liberty, or property." U.S. Const., amend XIV, § 1. Another section of the Constitution that references the existence of these rights, the Ninth Amendment, states that the explicit list of rights in the Constitution is not exclusive because there are "others" not listed in the text but still "retained by the people." U.S. Const., amend IX.

Over the years, the Supreme Court has decided that a number of rights are included within this guarantee of "liberty." These rights include many fundamental civil and human rights guarantees related to intimate personal decisions and relationships. These rights are usually less about privacy in the colloquial sense than the right to "be let alone," or to take some specific action without interference from the government. Privacy rights the Court has included under "liberty" concern autonomy and the freedom to make certain choices.<sup>2</sup> This is why they are understood to be part of the "liberty" protected by the Due Process Clause.<sup>3</sup>

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<sup>1</sup> See *Meyer v. Nebraska*, 262 U.S. 390 (1924) (Bans on teaching certain languages to children unconstitutional.); see also *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1923) (Ban on parents sending their children to parochial schools unconstitutional.).

<sup>2</sup> See Benjamin E. Bratman, *Brandeis and Warren's The Right To Privacy and The Birth of The Right to Privacy*, 69 Tenn. L. Rev. 623, 625 (2002) (describing Justices Brandeis and Samuel Warren's influential legal article on the right to privacy, which they articulated as "the right to be let alone").

<sup>3</sup> For example, the Supreme Court found that the freedom to marry a consenting partner of one's choosing exists on the basis of the Due Process Clause because marriage "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. at 12 (1967); see also *Obergefell v. Hodges*, 576 U.S. 644, 663-81 (2015) (Same-sex marriage prohibitions found unconstitutional partly on this basis, too, but partly under another part of the Fourteenth Amendment, the Equal Protection Clause). See also

*Roe* is part of this line of cases. *Roe* helped define and expand the constitutional right to privacy that started to take shape in *Griswold* and older cases. *Roe* makes references to the older Due Process Clause privacy cases and explicitly uses them as justification, such as both *Griswold* and *Loving*. *Roe*, 410 U.S. at 153-56 (citing *Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 486). *Roe*'s holding was that pregnant people are entitled to abortion before the fetus is viable. 410 U.S. at 152-53. Nearly 20 years later, the Supreme Court upheld much of the holding in *Roe* and ruled that state laws could not impose an "undue burden" on abortion prior to viability. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). To this day, *Roe* and *Casey* largely define what the "zone" or "area" of privacy covers in regards to abortion and define the boundaries of abortion rights. *Roe* and *Casey* have been part of the basis for subsequent Supreme Court decisions that further define the right to privacy. They are a key part of the line of cases going back to *Griswold* like links in a chain. This line of cases, in turn, sets many of the bounds of privacy rights that individuals can assert against governmental interference in their lives.

Justice Alito's draft, if published as-is or with few changes, will overturn *Roe* and *Casey*. This will eliminate any federal right to abortion and narrow the zone of privacy. Alito argues, on the basis of the Supreme Court's ruling in *Washington v. Glucksberg*, that only rights "deeply embedded in this Nation's history and tradition" and "implicit in the concept of ordered liberty" are fundamental and protected by the Fourteenth Amendment. 521 U.S. 702, 720-21 (1997). The draft shows that a critical mass of Justices is ready to limit these rights to those explicitly stated in the Constitution or understood as essential to liberty not much later than when the Fourteenth Amendment became part of the Constitution just after the Civil War. They view aspects of autonomy that would not have been understood as components of ordered liberty generations ago as unprotected by the Fourteenth Amendment.

The Court is poised to decide that, because abortion rights may not have been perceived as part of ordered liberty in the 1860s, they cannot be protected as such today. The draft repudiates the idea that courts should account for the changes in common understanding of the concept of liberty that have taken place since the adoption of the Fourteenth Amendment when they decide what rights it protects. This is at odds with the Court's decisions about personal autonomy and privacy in the last several decades.<sup>4</sup> For this reason, the draft opinion is a radical departure not just from *Roe* but from the way courts have understood and decided cases about the constitutional right to privacy for many years. This is a particularly troubling aspect of the draft because it would eviscerate the concept of Supreme Court *stare decisis*.

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*Lawrence v. Texas*, 539 U.S. 558, 564-75(2003)(finding state law ban on consensual sexual intimacy of same-sex couples violated Constitution).

<sup>4</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 671-72 (2015)(*Obergefell* explained that the right of same-sex couples to marry was a right that emerged from a "better informed understanding of how constitutional imperatives define ... liberty," rather than a concept that was part of liberty as it was understood in the 1860s or earlier.).

*Stare decisis* is a legal rule that courts should generally follow rules established in previous cases rather than overturning them. Thought to have originated before 1400, *stare decisis* came to this land with British colonists. The Supreme Court has honored it since the Court's early years. *Stare decisis* keeps courts interpreting law rather than making it and maintains the system's stability. When courts follow their previous decisions, and those of courts above them, in cases similar to ones that have already been decided, the legal consequences of behavior are predictable. Rights and obligations are clear. Lawyers can give reliable advice, helping their clients make informed decisions. Individuals can plan their lives and make decisions. Without *stare decisis*, the law could change abruptly. It would be hard for individuals, organizations, or the government to know the consequences of courses of action. Abandoning this ancient doctrine could throw the legal system into chaos. For this reason, the Supreme Court has historically avoided overruling its own decisions unless absolutely necessary.

The leaked draft is a radical break with *stare decisis*. In it, Justice Alito correctly states that overruling a prior case is a "serious matter," but then proposes a five-part test for when the Court should not to adhere to *stare decisis*. The test is a new idea. It has not been part of the American legal landscape before. It includes many subjective factors. If the Court, and other federal courts, move forward with this new test, the Supreme Court could decide that a case failed the test and overrule it at any time, obliterating the lower courts' understanding of legal issues that may have been considered settled for generations. With long-answered legal questions suddenly up for grabs again, parties would engage in more litigation. This state of affairs would be especially harmful to people who depend on the courts to enforce their civil rights.

The draft opinion states that it would only impact abortion, not other privacy cases. This is an absurd claim because Justice Alito's draft opinion does not simply strike down *Roe* and *Casey*. It takes aim at the reasoning used to decide *Roe*, *Casey*, and many other cases, the reasoning that governs the constitutional right to privacy, autonomy, and entitlement to make personal decisions without governmental interference. Attorneys and activists interested in curtailing civil rights could easily use Justice Alito's reasoning to bring cases challenging other aspects of the right to privacy. The draft appears to be a deliberate invitation to bring such challenges. By casting aside settled law about what the Fourteenth Amendment means and *stare decisis*, the draft is poised to eliminate numerous fundamental rights essential to marginalized people.

## **Sexuality, Marriage, and Reproduction**

The Supreme Court's line of Due Process Clause privacy cases established, even before *Roe*, a fundamental right to marry and have intimate relations free from governmental interference.<sup>5</sup> These rights to marriage and intimacy have increasingly protected people long denied such fundamental human rights, particularly LGBTQIA+ people, people with disabilities, and people of color. These rights are among the most contested for people with disabilities, many of whom

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<sup>5</sup> For example, *Griswold* was related to the right of married couples to use contraception. 381 U.S. at 480-82.

are still denied access to marriage and intimacy.<sup>6</sup> The draft puts decades of legal gains regarding these rights under threat. If marriage and intimacy rights that have been perceived as settled for years are eliminated or weakened, that will affect people with disabilities who are or seek to engage in marriage and intimacy now, particularly those who are also LGBTQIA+ or BIPOC. It will also stymie further progress on these crucial issues for all members of the disability community.

### **Sexuality**

If the draft is published in its present form, groups interested in curtailing marriage and intimacy rights will take up its invitation to bring cases challenging these rights. *Griswold* and the related birth control case *Eisenstadt v. Baird*, 405 U.S. 438 (1972), are likely to be among the first casualties. The draft opinion's disregard for *stare decisis* and privacy shows significant risk of the Court overturning *Griswold*. It is possible that the Court will not reach cases decided before *Roe*, but Justice Alito's justification for his ruling in the draft opinion overturns the earlier cases if taken to its logical conclusion.

*Eisenstadt*, in which the Court determined that unmarried people had the right to contraception, is especially likely to be overturned. 405 U.S. at 453-54. If the Court pares the right to privacy down to what would have been widely recognized in or soon after the 1860s, it may decide that a right to privacy within marriage existed then and exists now. This would preserve *Griswold*. However, the extension of this right to allow "the individual, married or single, to be free from unwarranted governmental intrusion into... the decision whether to bear or beget a child" would not have been recognized at that time. *Id.* at 453. If *Eisenstadt* is overturned, there will be no federal right to contraception for unmarried people, including for disabled people who face barriers to marriage. If *Griswold* also falls, there will be no such right for married couples. Legal contraception may disappear in many states. This will erode bodily autonomy and the ability of couples and individuals to make reproductive decisions. It will limit access to intimacy for people with disabilities seeking to avoid pregnancy, including those who do so because carrying to term might have life-threatening consequences.

The draft opinion could also be used to challenge the privacy-based right of consenting adults to engage in sexual intimacy. In *Lawrence v. Texas*, the Supreme Court found unconstitutional state laws criminalizing certain sexual conduct between people of the same sex. 539 U.S. 558, 578-79 (2003). The Court's opinion in *Lawrence* was significantly based on *Casey*, which will be

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<sup>6</sup> See Gabriella Garbello, *Rights Not Fundamental: Disability and the Right to Marry*, 14 St. Louis U. J. Health L. & Pol'y 591-95 (2021)(explaining the cause of the disability "marriage penalty" in Medicaid and SSI); Disability Rights Educ. & Defense Fund, *Disabled Adult Child (DAC) Marriage Penalty* (2022); Nat'l Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination* 28 (Mar. 22, 2018)(showing that the right to marry can be abridged under guardianship); Frank Eltman, *Disabled Couple Seeks Life Together in Group Home*, NBC Channel 4 New York (May 7, 2013), <https://www.nbcnewyork.com/news/local/disabled-couple-living-apart-files-lawsuit-live-together-group-home/2079107/>.

immediately overturned along with *Roe* if the draft opinion is published in its present form. In *Lawrence*, the Court quoted *Casey* in stating that “the most intimate and personal choices a person may make in a lifetime ... are central to the liberty protected by the Fourteenth Amendment.” *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. 833, 851 (1992)). This kind of free choice of sexual partners would not have been viewed as central to liberty generations ago. For this reason, the logic of the draft opinion places *Lawrence* and the right to intimacy with consenting adult partners under threat.

If the final *Dobbs* opinion is much like the draft, those hoping to curtail civil liberties will take up Justice Alito’s invitation to bring litigation undermining the right to privacy. This could end the constitutional right to intimacy between consenting adults. This would permit sexual intimacy of same-sex couples to become unlawful again in some states, but there is no reason the end of this right would not apply to other sexual conduct that makes some people uncomfortable, such as that of consenting adults with disabilities. If states ban some consensual sex between adults, the effects of such statutes will not be evenly distributed. Police will not randomly inspect bedrooms for signs of prohibited intimacy. Instead, they will seek it out in settings known as havens of LGBTQIA+ people and find it in pursuit of other crimes in over-policed communities. BIPOC and poor people will bear the brunt of incidental arrests and prosecutions.<sup>7</sup> Because disabled people are disproportionately BIPOC, LGBTQIA+, and living in poverty, legislation would not have to target the disability community to be catastrophic for it.<sup>8</sup> Any prohibitions on consensual intimacy would increase efforts to control the sexual relations of people with disabilities. Guardians, relatives, and staff in institutions and group homes would be more inclined to try to prevent the sexual expression of people with disabilities than many already are if it came with the prospect of criminal liability.

## Marriage

If published as written, the *Dobbs* opinion will be used to challenge the right to marry any consenting adult. Under particular threat is *Obergefell v. Hodges*, in which the Supreme Court stopped states from banning same-sex marriage. 576 U.S. 675 (2015). *Obergefell* is part of the line of privacy cases going back to *Griswold*. *Obergefell*’s analysis finding a right to marry for same-sex couples is largely based in the constitutional right to privacy. *See Obergefell*, 576 U.S. 665-68. The *Obergefell* Court also found that the prohibitions violated the Equal Protection Clause, the portion of the Fourteenth Amendment that requires laws to treat similarly-situated people the same. *Id.*, note 2.

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<sup>7</sup> For example, one of the two men arrested together who challenged the ban on “deviate sexual intercourse” for same-sex couples in *Lawrence* was Black. Police arrested the men based on the unfounded allegations of a third party who specifically cited the race of petitioner Tyrone Garner when he called the police. *See Douglas Martin, Tyron Garner, 39, Plaintiff in Pivotal Sodomy Case, Dies*, N.Y. Times, Sept. 14, 2006, <https://www.nytimes.com/2006/09/14/obituaries/14garner.html>.

<sup>8</sup> *See* Nanette Goodman, Michael Morris, Kelvin Boston, and Donna Walton, *Financial Inequality: Disability, Race and Poverty in America* (Nat’l Disability Inst. 2019); *see also* Movement Advancement Project. July 2019. *LGBT People With Disabilities*. <https://www.lgbtmap.org/lgbt-people-disabilities>. (Last accessed May 18, 2022).

A marriage case related to *Obergefell*, also in the jeopardized line of cases, is *Zablocki v. Redhail*, 434 U.S. 374 (1978). Were this case overturned, it could have significant effects on marginalized people. In *Zablocki*, the Supreme Court found a law keeping people with unpaid child support obligations from marrying unconstitutional. *Zablocki*, 434 U.S. at 391. The Court based its opinion on the line of privacy cases running from *Griswold* to *Roe*. *Id.* at 382-86. If *Roe* and then *Griswold* are overturned, that will weaken the rationale in *Zablocki* to the point that its validity will be in question, leaving it easy to overturn. The fall of *Zablocki*, or even the logic supporting its decision becoming questionable, would invite states to place arbitrary restrictions on marriage. This would primarily harm marginalized people.

The statute found unconstitutional in *Zablocki* concerned a person who was unable to make child support payments or prove his children would be unlikely to “become public charges.” *Id.* at 375. The law discriminated against people whose children use public benefits. People with disabilities are among the poorest demographics in the United States and would be particularly unlikely to be able to afford any means test states might apply to marriage if *Zablocki* were overturned.<sup>9</sup> Members of the BIPOC and LGBTQIA+ communities are also more likely to be poor.<sup>10</sup> If the Court overturns *Zablocki*, states could disincentivize or ban people who use benefits from marrying, expanding barriers to marriage from Social Security recipients to others who use public benefits.

### **Sterilization**

The right to avoid reproducing will obviously be affected if *Roe* is overturned, but the rationale in the draft would overturn *Roe* in a way that may also affect the right to be free of involuntary sterilization. At least two Supreme Court cases deal with the topic of involuntary sterilization. The cases discussed here predate the *Griswold* line of cases, are not based on it, and are unlikely initial casualties of post-*Roe* attacks on privacy. However, it is implausible that the rationale articulated in the draft will not be used widely if it is present in the final version. The opinion states that any right of privacy and autonomy not explicitly mentioned in the Constitution is not protected by the Due Process Clause unless it has been understood as one of society’s basic liberties for generations. The draft also makes it easier for the Court to overrule past decisions, including Due Process Clause cases concerning privacy. This creates the likelihood that the

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<sup>9</sup> The National Council on Disability summarized the state of disability’s relationship with poverty, in part, in a 2017 report. See Nat’l Council on Disability, National Disability Policy: A Progress Report 21 (Oct. 26, 2017), available at [https://ncd.gov/sites/default/files/NCD\\_A\\_Progress\\_Report\\_508.pdf](https://ncd.gov/sites/default/files/NCD_A_Progress_Report_508.pdf).

<sup>10</sup> For a brief overview see, e.g., John Creamer, *Inequalities Persist Despite Decline in Poverty For All Major Race and Hispanic Origin Groups*, U.S. Census Bureau (Sept. 15, 2020), <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html>; M. V. Lee Badgett, Soon Kyu Choi, Bianca D.M. Wilson & UCLA School of Law Williams Inst., *LGBT Poverty in the United States: A study of differences between sexual orientation and gender identity groups 2-4* (Oct. 2019), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>.



Court will destroy *Griswold* and its descendants and then move on to predecessors. For this reason, Justice Alito's draft opinion could bring about more involuntary sterilization.

In *Skinner v. Oklahoma*, the Supreme Court invalidated statutes that allowed the involuntary sterilization of people convicted of certain crimes. 316 U.S. 535, 535-37 (1942). The Court could have written a narrow opinion that only addressed the constitutionality of one statute. Instead, it described reproduction as "a basic liberty." *Skinner*, 316 U.S. at 541. *Skinner* is an ancestor rather than a descendant of *Griswold*, but the two cases represent different aspects of the same right to reproductive choice. The decision in *Griswold* cites *Skinner* in support of the existence of a right to privacy. *See Griswold*, 381 U.S. at 485 ("We have had many controversies over these penumbral rights of 'privacy and repose'" (citing *Skinner*, 316 U.S. at 541)(1942))).

If the Court is ready to reject most privacy rights and casually overturn its past decisions long regarded as settled law, *Skinner* is in jeopardy. If it is overturned, or its validity thrown into question because decisions based on similar rationales are overturned, there is another Supreme Court decision on involuntary sterilization waiting in the wings. The Court decided *Buck v. Bell* in 1927, at the height of American eugenics. 274 U.S. 200. In *Buck*, it placed its stamp of approval on involuntary sterilization. Courts rarely reference *Buck* today. The decision is widely regarded as a shameful episode in the Court's history, but the decision is valid law. If the *Griswold* line of cases is overturned, undermining the privacy and Fourteenth Amendment rationales supporting older, related cases, *Skinner* will be, at best, weakened. It may not survive.

If this transpires, there will be nothing, at the federal level, to shield the traditional victims of sterilization from *Buck*. Involuntary sterilization is not ancient history. As of 2012, eleven states permitted it, and there are recent reports of sterilization taking place under governmental pressure.<sup>11</sup> In the United States, it has historically been used against people with disabilities, BIPOC, poor people, and people who have been criminalized. There is no reason to believe widespread involuntary sterilization would play out differently now. Damage to legal protections against it invites its occurrence. This has life-altering consequences for marginalized people who are forcibly sterilized and those who are not, as many who know they are at risk will live in fear.

## Medical Privacy

Autonomy in medical decisions is essential, particularly to those who experience discrimination in health care. People with disabilities often lack control over our health care due to

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<sup>11</sup> *See* Nat'l Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* 40 (Sept. 27, 2012); DREDF, California Forced or Involuntary Sterilization Compensation Program (2022); *see also* David M. Perry, *Our Long, Troubling History of Sterilizing the Incarcerated*, The Marshall Project (Jul. 26, 2017); *see also* David M. Perry, *Our Long, Troubling History of Sterilizing the Incarcerated*, The Marshall Project (July 26, 2017, 10:00 PM), [https://www.themarshallproject.org/2017/07/26/our-long-troubling-history-of-sterilizing-the-incarcerated?gclid=Cj0KCQjwspKUBhCvARIsAB2lYuuVk00JeNpS2NFE-ndTkWR0pxLscTfY\\_7foYR6yp92OAhEAWAXe3F0aAk5-EALw\\_wcB](https://www.themarshallproject.org/2017/07/26/our-long-troubling-history-of-sterilizing-the-incarcerated?gclid=Cj0KCQjwspKUBhCvARIsAB2lYuuVk00JeNpS2NFE-ndTkWR0pxLscTfY_7foYR6yp92OAhEAWAXe3F0aAk5-EALw_wcB).

presumptions about our decision-making capacity or guardianship.<sup>12</sup> We experience significant health disparities, often due to ableist beliefs about our quality of life.<sup>13</sup> LGBTQIA+ people encounter discrimination in health care, including denial of gender affirming care and primary care and harassment by providers.<sup>14</sup> People of color have long experienced discrimination in health care that worsens the health disparities created by systemic racism.<sup>15</sup> Many people with disabilities are also BIPOC and/or LGBTQIA+ and experience particularly acute health disparities. Because the right to autonomy in health care choices is part of the constitutional right to privacy, the draft threatens marginalized people’s right to make these crucial decisions. It could lead to the overturn of medical decision-making cases, related to *Roe* and *Casey*, on the ability to choose to refuse or to obtain care and the right to privacy in one’s medical information.

### **Medical Decision-Making**

The Supreme Court has decided that the right to refuse medical treatment is part of the privacy right based on the Due Process Clause that the draft seeks to limit. *Cruzan v. Dir., Mo. Dep’t of Health* concerned a woman in a coma after a car accident. 497 U.S. 261, 266-68 (1990). Her parents sought to withdraw life support. *Id.* at 268-69. The Court decided that refusing medical treatment is a liberty protected by the Due Process Clause. *Id.* at 278-82. In *Cruzan*, the Court references *Roe* and the *Griswold* line of cases to determine that patients have a right to self-determination in major medical decisions. *Id.* at 340-42. In referencing the *Griswold* line of cases, the Court stated that it “has long recognized that the liberty to make the decisions... constitutive of private life is so fundamental to our concept of ordered liberty,” and that “the sanctity, and individual privacy, of the human body is obviously fundamental to liberty.” *Cruzan*, 497 U.S. 340-42 (*citation omitted*)).

*Cruzan* is a Due Process case on the fundamental right to autonomy and bodily integrity. It is cited in *Casey* as “... an exemplar of *Griswold* liberty” and “a rule ... of personal autonomy and bodily integrity, with ... affinity to cases recognizing limits on governmental power...” to

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<sup>12</sup> See Nat’l Council on Disability, *Beyond Guardianship* at 126 (“Guardianship is sometimes sought because an individual is thought to be unable to make medical decisions for themselves. Often, this is because a physician or other medical professional does not feel that they can obtain “informed consent” from the person to proceed with a medical treatment, procedure, or even examination”).

<sup>13</sup> Andrés J. Gallegos, *Misperceptions Of People With Disabilities Lead To Low-Quality Care: How Policy Makers Can Counter The Harm And Injustice*, HealthAffairs (Apr. 1, 2021), <https://www.healthaffairs.org/doi/10.1377/forefront.20210325.480382/>.

<sup>14</sup> Sharita Gruberg, Lindsay Mahowald, and John Halpin, *The State of the LGBTQ Community in 2020*, Center for American Progress (Oct. 6, 2020, 9:00am), <https://www.americanprogress.org/issues/LGBTQ-rights/reports/2020/10/06/491052/state-LGBTQ-community-2020/>; Lambda Legal, *When Health Care Isn’t Caring: Lambda Legal’s Survey of Discrimination Against LGBT People and People with HIV 5* (2014), available at [www.lambdalegal.org/health-care-report](http://www.lambdalegal.org/health-care-report); Ryan Thoreson, *You Don’t Want Second Best”: Anti-LGBT Discrimination in US Health Care*, Human Rights Watch (Jul. 2018), available at <https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care>.

<sup>15</sup> An exhaustive treatment of the severe medical racism present in the United States is beyond the scope of this memorandum. However, for a brief summary see Mathieu Rees, *Racism in healthcare: What you need to know*, Medical News Today (Sept. 16, 2020), <https://www.medicalnewstoday.com/articles/racism-in-healthcare>.

control individuals' personal decision. *Casey*, 505 U.S. 833, 857 (citing *Cruzan*, 497 U.S. at 278)). Because the draft jeopardizes the rationale on which *Cruzan* is based, *Cruzan* is in danger. If released as written, this opinion would provide strong arguments for overruling *Cruzan*. The Court's decision, in *Washington v. Harper*, that the right to refuse antipsychotic medications is protected by the Due Process Clause is similarly at risk. 494 U.S. 210, 228 (1990).

The right to refuse treatment that *Cruzan*, *Harper*, and similar cases protect is concrete and immediate for marginalized people, especially people with disabilities. Other liberties have little meaning in the absence of basic, bodily autonomy about whether to accept or refuse care. If these privacy in health care decision-making cases are overturned, or their validity is thrown into question by decisions that reject their rationale, autonomy in health care choices will weaken in many parts of the country. This will narrow the already-limited scope of choices marginalized people often face in health care settings.<sup>16</sup>

*Doe v. ex. rel. Tarlow v. D.C.* illustrates what could happen to the right to make medical decisions if the understanding of the Due Process Clause expressed in the draft prevails over that outlined in *Cruzan*, *Casey*, and *Harper*. 489 F.3d 376 (D.C. Cir. 2007). In *Doe*, people with intellectual disabilities sued the District of Columbia because they had been subjected to elective surgeries without consent in its institutions. *Doe*, 489 F.3d at 378. Justice Kavanaugh, a judge on the D.C. Circuit Court of Appeals before he joined the Supreme Court, wrote the opinion in *Doe*. This opinion holds that inflicting unwanted medical procedures on the class of people with disabilities did not violate their rights. Using similar reasoning to Justice Alito in the leaked draft, then-Judge Kavanaugh wrote that class members' right to make such choices was neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty." *Id.* at 383 (quoting *Glucksberg*, 521 U.S. 702, 720-21 (1997)). This disturbing ruling may represent a new normal for the rights of people with disabilities and other marginalized persons if the draft opinion's reasoning becomes law.

### **Medical Privacy**

The draft opinion could weaken precedent about the privacy of medical information for minors with possible implications for adults under guardianship, whose legal status is similar in many states. The overturn of *Roe* would also overturn *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). In *Danforth*, the Court found two-parent and spousal notification requirements for abortion unconstitutional. 428 U.S. 52, 68-75 (1976). Because *Danforth* was decided on the basis of *Roe*, the draft would eliminate precedent promoting the medical privacy of people in difficult circumstances. This risks eroding medical privacy and setting legal precedent for making the

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<sup>16</sup> For example, even adults subject to guardianship technically retain the right to refuse lifesaving treatment in many states. *See, e.g.*, Mass. Gen. Laws. ch. 190B §5-306A(a)(2022)(holding that these decisions cannot be made by a guardian, but rather must be made using a substituted judgment arrangement). With *Cruzan* overturned, it is possible that health care providers or guardians will be permitted to make choices for or against lifesaving treatment or antipsychotic medications on another's behalf in more jurisdictions.

medical decisions of vulnerable people all the more contingent on the approval of others. People with disabilities, LGBTQIA+ people, and anyone whose moral or religious values differ from those of their immediate family would be at particular risk of harm.

## **Housing**

A decision that provides important protections for family living arrangements is also threatened by the leaked draft's rationale. *Moore v. E. Cleveland* is an early part of the *Griswold* line of cases that also cites the *Griswold* antecedents described in the preceding pages. 431 U.S. 494, 499 (1977). In *Moore*, the Court overturned a city ordinance limiting extended family housing arrangements on the basis of liberty and privacy under the Due Process Clause. *See Id.* at 495-97. Without the precedent set in *Moore*, states and municipalities would be free to regulate which family arrangements may cohabit. It is unclear whether the Court would view choosing to live in a multigenerational household or take in a child from one's extended family as something that would have been understood as part of liberty generations ago. Because some municipalities are responding to changes in patterns of living arrangements in response to rising housing costs by regulating living arrangements, it seems quite possible that *Moore* will be directly challenged.<sup>17</sup>

If *Moore* is overturned, any ensuing legislation that prohibits extended family households or other group living arrangements will harm marginalized people. Immigrant families and families of color would suffer considerably, as they represent a large share of multigenerational households.<sup>18</sup> Restrictions on family living might also make kinship placement less feasible as an alternative to foster care. Because the children of BIPOC and disabled parents are disproportionately removed, this would be particularly harmful to families with BIPOC and disabled members.<sup>19</sup> Such restrictions would also harm LGBTQIA+ families, who might not meet narrow definitions of family, particularly in states where same-sex marriage becomes unlawful. Legislation limiting the cohabitation of related persons would also affect people with disabilities who rely on family caregivers or other group living arrangements.

## **Other Possible Effects**

The draft may have further effects that will increase litigation and chaotic legal developments. For example, it is uncertain whether states that ban abortion will be able to prohibit travel to places where it is legal for that purpose or impose civil or criminal liability on out-of-state

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<sup>17</sup> See Katie Balevic, *A Kansas city unanimously voted to ban co-living rentals, effectively making roommates illegal in some zoning districts*, Business Insider (May 1, 2022, 9:34 AM), <https://www.businessinsider.com/kansas-city-unanimously-ban-co-living-rental-units-roommates-illegal-2022-5>.

<sup>18</sup> See Pew Research Center, *Fighting Poverty in a Bad Economy, Americans Move in with Relatives* (October 3, 2011), <https://www.pewresearch.org/social-trends/2011/10/03/chapter-3-demographics-of-multi-generational-households/>.

<sup>19</sup> See Children's Bureau/ACYF/ACF/HHS, *Child Welfare Practice to Address Racial Disproportionality and Disparity*, Bulletins for Professionals, April 2021, [https://www.childwelfare.gov/pubpdfs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf); see also See Nat'l Council on Disability, *Rocking the Cradle*, *supra*.

prescribers involved in abortion by mail.<sup>20</sup> The draft does not address these questions, though they are pressing because of legislative developments in several states. If states prosecute their residents for conduct in another jurisdiction that was lawful where it occurred, that may generate legal disputes between states. Speech will be at issue if states try to limit information provision about abortion. The draft opinion may encourage such legislation. At least one case on this issue has arisen in the past.<sup>21</sup> It is unclear how such cases would be decided where abortion is completely illegal in one state and legal in another because the First Amendment does not protect “incitement to imminent lawless action[.]” *See Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969).

The draft opinion fails to address these concerns. It weakens older decisions that may have answered some of these questions by undermining *stare decisis*. For these reasons, the publication of an opinion in *Dobbs* substantially similar to the leaked draft will probably cause an increase in litigation about jurisdictional issues between states. Rendering an intimate issue profoundly entangled with other civil rights of variable legality will not merely “return the issue of abortion to the people’s elected representatives.” It will confuse and frustrate segments of society including marginalized people, healthcare providers, legislators, states, and businesses for decades to come.

## Conclusion

The *Dobbs v. Jackson* draft opinion will have devastating consequences unless it is significantly altered before it is finalized and released. By drastically narrowing the scope of rights protected by the Fourteenth Amendment’s Due Process Clause and eviscerating *stare decisis*, the draft opinion will have an impact far beyond abortion. It may affect personal rights surrounding marriage, intimacy, sterilization, medical care, housing, speech, and more. It may alter the relationships between states. To protect our communities from such an assault, we must unite in our opposition to this opinion and its unjust result. Our rights - and the rights of countless other Americans - depend on it.

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<sup>20</sup> See Rachel Treisman, *Removing federal abortion-rights protections may spark new legal fights between states*, NPR (May 5, 2022, 1:10PM), <https://www.npr.org/2022/05/05/1096882269/roe-wade-abortion-rights-interstate-legal-fights>.

<sup>21</sup> See *Bigelow v. Virginia*, 421 U.S. 809, 818-19 (1975)(Supreme Court ruled that VA prosecution of editor who allowed advertisements concerning abortion in NY to circulate in VA newspaper, was unconstitutional because it violated the First Amendment.).