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Access is Everything - Post RHPA Virginia - What's Next? The Case for RHEA and Other Matters

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ACCESS IS EVERYTHING - POST RHPA VIRGINIA - WHAT'S NEXT? THE CASE FOR RHEA AND OTHER MATTERS.

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ABSTRACT

Virginia has taken positive forward steps to liberalize its abortion legislation, bringing it closer in line with medical science and common sense. However, accessing abortion care remains difficult for many, and additional legislative measures are necessary to make the full range of reproductive healthcare accessible for all, regardless of immigration status, race, gender, income, or geography. The Reproductive Equity Healthcare Act, a bill modeled in part on its Oregon namesake, is the next logical step forward towards making reproductive justice a reality for all Virginians. While the details of the final bill may vary, there are fundamental pillars that reproductive rights, health and justice advocates agree are essential and fundamental to the goals of the Bill. This paper lays out the pragmatic case for adopting the Reproductive Health Equity Act.

INTRODUCTION

There's an old saying often repeated by us in the reproductive rights, healthcare, and justice movements: "Roe was a promise unfulfilled." We have entered a decade where even the "promise" itself is under unprecedented attack.[1] It is not only abortion rights that have come under attack nationally and in the states. Reproductive healthcare access from contraception to adoption faces a continuous onslaught, driven by political convenience.[2] Reproductive rights and healthcare have become one of the favorite wedge issues of the modern conservative movement. As a result, instead of moving forward, there is a concerted effort to strip away hard-won protections in many states.[3] At a time when access to healthcare has already been made difficult for so many, COVID-19 is being used as an excuse by anti-abortion state administrations and legislators to stamp out abortion access in their states.[4] In Virginia, we can and must keep moving in the other direction. This paper lays out one path forward to pass Virginia's Reproductive Health Equity Act ("RHEA").

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[1] *See* Elizabeth Nash & Lauren Cross, *2021 Is on Track to Become the Most Devastating Antiabortion State Legislative Session in Decades*, GUTTMACHER INST. (Apr. 30, 2021), https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades; Nina Totenberg, *Mississippi Is Trying To Get the Supreme Court to Reverse Roe*, NPR (July 23, 2021), https://www.npr.org/2021/07/23/1019746478/on-abortion-mississippi-swings-for-the-fences-asks-the-supreme-court-to-reverse-.

[2] Chris Johnson, *Amid Coup Chaos, Trump Quietly Erases LGBTQ Protections in Adoption, Health Services*, WASH. BLADE (Jan. 8, 2021), https://www.washingtonblade.com/2021/01/08/amid-coup-chaos-trump-quietly-erases-lgbtq-protections-in-adoption-health-services/; Adam Sonfeld, *Seeing the Whole Pattern, Coordinated Attacks on Birth Control Coverage and Access*, GUTTMACHER INST. (June 26, 2020), https://www.guttmacher.org/article/2020/06/seeing-whole-pattern-coordinated-federal-attacks-birth-control-coverage-and-access.

[3] *See* Nash & Cross, *supra* note 1.

[4] Dennis Carter, *Abortion Access During COVID-19 State by State,* REWIRE NEWS GROUP (Apr. 14, 2020), https://rewirenewsgroup.com/article/2020/04/14/abortion-access-covid-states/.

After providing some brief context, Section I will go through the basics of the proposed Virginia RHEA placing the proposed legislation in the broader political context, and Section II will place the issue of reproductive healthcare in the context of reproductive justice. The next sections of the paper will outline the policy reasons between the three parts of the RHEA bill that are non-negotiable red-lines for its core vision, including full coverage for abortion, full coverage for undocumented immigrants, and removing discrimination against transgender individuals in reproductive healthcare coverage. Section VI will address the aspects of reproductive rights, healthcare, and access that a RHEA will not resolve. While passing RHEA is a vital next step, it is not the end of the road for reproductive health, rights, and justice in Virginia. Section V ultimately concludes that despite these shortfalls, RHEA is an important next step for reproductive rights in Virginia.

I. ATTACKS ON REPRODUCTIVE RIGHTS

When Donald Trump became president in 2016, his administration moved to fulfill his campaign promise to restrict reproductive rights.[5] The administration's slew of attacks consisted of packing the federal bench, curating the Supreme Court with explicitly anti-abortion judges, gutting Title X, reimposing the global gag rule, and vastly expanding the exception to the Affordable Care Act's contraception mandate.[6] The election of a President whose personal life and business practices appalled many conservatives paid dividends for those bent on making abortion illegal and inaccessible.[7] And while the 2020 election ushered in a new presidential administration, one that was more aligned with the values of the reproductive rights movement, reproductive

[5] Miriam Berg, *Trump Says He's the Best Chance to Overturn Roe v. Wade, Yet His Aide Says He's Pro-Women*, PLANNED PARENTHOOD ACTION FUND (May 11, 2016), https://www.plannedparenthoodaction.org/blog/trump-says-he-the-best-chance-overturn-roe-v-wade.

[6] *See* Ruth Dawson, *Trump Administration's Domestic Gag Rule has Slashed the Title X Network's Capacity by Half,* GUTTMACHER INST. (Feb. 5, 2020), https://www.guttmacher.org/article/2020/02/trump-administrations- domestic-gag-rule-has-slashed-title-x-networks-capacity-half; Devin Dwyre, *Supreme Court Allows Trump to Exempt Employers from Obamacare Birth Control Mandate*, ABC NEWS (July 9, 2020), https://abcnews.go.com/Politics/supreme-court-trump-exempt-employers-obamacare-birth-control/story?id=71254754; Bridget Kelly, *Trump Stacking Lower Courts*, THE HILL (Sept. 7, 2019), https://thehill.com/opinion/judiciary/460365-trump-stacking-lower-courts; David Smith, *Trump's Revenge, Tilting Supreme Court to the Right Poised to Bear Fruit,* THE GUARDIAN (May 23, 2021), https://www.theguardian.com/law/2021/may/23/us-supreme-court-trump-judicial-appointments; *The Devastating Impact of Trump's Global Gag Rule,* 393 THE LANCET 2359, 2359 (2019), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)313558/fulltext#articleInformation.

[7] *See e.g.,* Paul A. Djupe, *Did Evangelicals Hold Their Nose and Vote for Trump,* RELIGION IN PUBLIC (July 27, 2017), https://religioninpublic.blog/2017/07/27/did-evangelicals-hold-their-noses/ (showing that there was in fact some nose-holding when conservative voters chose to pull the level for Trump, though the discomfort with Trump's ethics was hardly universal, even among evangelical voters).

freedom advocates have learned that the battle over reproductive rights will be fought in the states rather than on the federal level.[8]

The current composition of the Supreme Court all but guarantees that *Roe v. Wade* will be either overturned or gutted to the point of being virtually meaningless.[9] The majority of people believe that *Roe* should stand and that abortion should remain legal.[10] However, despite the fact that abortion is a safe and common medical procedure with widespread public support, the conservative-leaning SCOTUS Justices have their own agenda.[11] If *Roe* does fall, Virginia will become the abortion safe haven in the Southeastern United States.[12] States to the south and west of Virginia will lose all or most of their abortion providers.[13]

A. Wins in Virginia for Abortion Access

In 2020 and 2021, Virginia removed some restrictions on abortion care responsible for a dearth of access to such care with the Reproductive Health Protection Act of 2020 ("RHPA") and HB 1896 /SB 1276 (2021).[14] RHPA repealed the Targeted Restrictions on Abortion Providers ("TRAP") and other medically inappropriate restrictions, while HB 1896/SB 1276 repealed

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[8] *See* Chloe Atkins, *A Crisis Moment: States Advocates Brace for New Fight Over Abortion Rights,* NBC NEWS (Jan. 11, 2021), https://www.nbcnews.com/politics/politics-news/crisis-moment-states-advocates-brace-new-fight-over-abortion-rights-n1253665; Lisa Lerer, *Biden's Silence on Abortion Rights at a Key Moment Worries Liberals,* N.Y. TIMES (May 27, 2021), https://www.nytimes.com/2021/05/27/us/politics/biden-abortion-democrats.html.

[9] *See* Mary Ziegler, *How the Supreme Court Could Overturn Roe While Claiming to Respect Precedent*, WASH. POST. (July 1, 2020), https://www.washingtonpost.com/outlook/how-supreme-court-could-overturn-roe/2020/07/01/51fe4a2c-bb1e-11ea-80b9-40ece9a701dc_story.html.

[10] For an extensive overview of the safety and efficacy of abortion, *see* NAT'L ACADS. OF SCIS., ENG'G, AND MED., THE SAFETY AND QUALITY OF ABORTION CARE IN THE UNITED STATES (2018); *see also* Carrie Blazina, et al., *Key Facts About the Abortion Debate in America*, PEW RESEARCH CTR. (June 17, 2021), https://www.pewresearch.org/fact-tank/2021/06/17/key-facts-about-the-abortion-debate-in-america/ (stating that "around six-in-ten U.S. adults (59%) say that abortion should be legal in all or most cases; 39% say it should be illegal in all or most cases"); *New PPP Poll Shows Overwhelming Majority of Virginians Support Legal Access to Abortion, As Pro-Choice Legislators Begin Efforts to Rollback Barriers to Abortion Care,* PRO-CHOICE VA. (Jan. 27, 2020), https://naralva.org/2020/01/27/new-ppp-poll-shows-overwhelming-majority-virginians-support-legal-access-abortion-pro-choice-legislators-begin-efforts-rollback-barriers-abortion-care/.

[11] *See* Joan Biskupic, *Supreme Court Conservatives Want to Topple Abortion Rights -- But Can't Seem to Agree on How*, CNN (Mar. 21, 2021), https://www.cnn.com/2021/03/19/politics/abortion-supreme-court-conservatives-thomas-roberts/index.html; *see also* Caitlin Cruz, *What We Know About Where The Supreme Court Justices Stand On Abortion Rights*, BUSTLE (July 3, 2018), https://www.bustle.com/p/the-supreme-court-justices-abortion-stances-reflect-two-competing-lines-of-thought-9656860.

[12] *See* Emma Sarappo, *What Will It Mean for DC, Maryland, and Virginia if Roe v. Wade Is Repealed? Here's What You Need to Know*, WASHINGTONIAN (Sep. 2, 2021), https://www.washingtonian.com/2021/09/02/what-happens-without-roe-dc-maryland-virginia/.

[13] *See What if Roe Fell*, CTR. FOR REPROD. RIGHTS, https://maps.reproductiverights.org/what-if-roe-fell?state=VA.

[14] 2020 VA. ACTS CHAPTER 101; 2020 VA. ACTS CHAPTER 899; Press Release, Governor Ralph Northam, Governor Northam Signs Virginia Reproductive Health Protection Act (Apr. 10, 2020).

the prohibition on abortion coverage on the state exchange.[15] Despite the strides Virginia has made in the last two years, disparities in access to reproductive healthcare remain due to a combination of existing restrictions and lack of coverage.[16]

The RHPA was a big shift in Virginia's abortion law. The bill removed three major abortion restrictions that impeded access to care. It repealed the requirement that a facility performing five or more abortions per month be regulated as a type of hospital.[17] This allows OBGYNs, PCPs (primary care physicians), internists, and other healthcare providers to perform abortions early in pregnancy in the course of their provision of care for their patients.[18] This change also allows abortion patients to go to the provider they trust for the full spectrum of care.

The RHPA also repealed the requirement that only physicians perform all abortions, allowing nurse practitioners and certified nurse-midwives to perform both procedural and medication abortions early in pregnancy.[19] There is no medical reason to restrict early abortion termination to physicians only.[20] Additionally, the RHPA repealed the requirement that patients receive an ultrasound, whether medically necessary or advisable or not, 24 hours before they can have the abortion.[21] This change allows medical professionals and patients to decide whether an ultrasound is necessary and, if it is, to perform it on the same day as the procedure. As a result, the number of visits a patient has to make to a clinic is reduced, which ultimately decreases

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15 *See* Kate Masters, *General Assembly Votes to Repeal Ban on Abortion Coverage by Plans on State Insurance Exchange*, VIRGINIA MERCURY: THE BULLETIN (Feb. 16, 2021), https://www.virginiamercury.com/blog-va/general-assembly-votes-to-repeal-ban-on-abortion-coverage-by-plans-on-state-insurance-exchange/.

16 The bill removing the abortion coverage prohibition on the state exchange did not mandate that abortion be covered. In Virginia, state employees are not provided with abortion coverage and Medicaid does not pay for abortion except in some very narrow circumstances. As of now, there are still around 16 abortion clinics in the state and while RHPA opened the door for other physicians and nurse practitioners to perform abortions without being subject to TRAP restrictions, those that do, do not appear to advertise. Abortion remains expensive and hard to access for marginalized communities and as of 2021. During this pandemic, Abortion Funds nation-wide, including Virginia, have seen an uptick in request for funding. *See* Alexandra Svokos, *Abortion Funds See Increase in Calls During Coronavirus Pandemic*, ABC NEWS (May 15, 2020), https://abcnews.go.com/US/abortion-funds-increase-calls-coronavirus-pandemic/story?id=70703745; *see also* Rebecca Tan, *Demand for Abortion Subsidies Surges in the D.C. Area as Funding Declines*, WASH. POST (June 9, 2021), https://www.washingtonpost.com/local/dc-abortion-funding-crisis/2021/06/09/1fee804c-c7a2-11eb-a11b-6c6191ccd599_story.html.

17 Chloe Atkins, *Easing of Abortion Restrictions by Virginia's New Democratic Majority Takes Effect*, NBC NEWS (July 1, 2020), https://www.nbcnews.com/politics/politics-news/easing-abortion-restrictions-virginia-s-new-democratic-majority-takes-effect-n1232671.

18 *Fact Sheet and Messaging Guide for Reproductive Health Protection Act,* VA. PRO-CHOICE COAL. (2020), https://virginia.prochoiceamericaaffiliates.org/wp-content/uploads/sites/12/2020/09/RHPA-Factsheet-and-messaging-guide-final-1.10.20-1.pdf.

19 *Id*.

20 *Id*.

21 *Id*.

the amount of time off and travel a patient is required to have before their abortion. Lastly, the RHPA also repealed the requirement that patients receive state-mandated information about their abortion and the gestation of a fetus leaving.[22] This requirement that did not exist for any other medical procedure.[23]

In addition to the RHPA, the *Falls Church Healthcare Center et al. v. Norman Olive et al.* court case decided on September 30, 2019, allowed abortions in the second trimester to be performed at an abortion provider outside of a hospital setting.[24] In 2021, the General Assembly also removed the abortion restriction on insurance plans trading on the ACA exchange and, when it is established, to be traded on the newly formed state exchange.[25] This change does not mandate private insurance coverage, but it does allow plans to cover abortion and be traded on the exchange.[26]

B. Other Reproductive Rights Developments in Virginia

In addition to these changes, Virginia has also made strides in expanding other kinds of reproductive access. For example, in recent years, Virginia has expanded contraceptive access through a Long-Acting Reversible Contraceptives ("LARC") program providing both long-acting contraceptives and other forms of birth control to low-income patients.[27] Virginia has also expanded its Family Access to Medical Insurance Security Plan ("FAMIS") coverage to more pregnant persons. Specifically, as of July 1, 2021, Virginia started to offer comprehensive prenatal coverage through FAMIS for pregnant individuals who meet all other eligibility criteria, regardless of immigration status.[28] However, much more needs to be done.

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[22] *Id.*

[23] *Id.*

[24] Falls Church Med. Ctr., LLC v. Oliver, 412 F. Supp. 3d 668, 705 (E.D. Va. 2019).

[25] Amelia Heymann, *Virginia Senate Passes Bill to Repeal Ban on Abortion Coverage for Health Insurance Plan,* WAVY (Jan. 22, 2021), https://www.wavy.com/news/politics/virginia-politics/virginia-senate-passes-bill-to-repeal-ban-on-abortion-coverage-for-health-insurance-plans/.

[26] *Id.*

[27] *Virginia Launches $6 Million Contraceptive Initiative,* VA. DEPT. OF HEALTH (Oct. 3, 2018), https://www.vdh.virginia.gov/news/archived-news-releases/2018-news-releases/virginia-launches-6-million-contraceptive-initiative/; *see also* VA. GEN. ASSEMB., FLOOR APPROVED REQUESTS TO HOUSE BILL 30 100 https://budget.lis.virginia.gov/get/amendmentpdf/4100/.

[28] H.D. 1800 Amend., 1st Special Sess., at 131 (Va. 2021).

History has shown that *Roe* is in itself flawed. Locating the right to abortion in privacy has led to a flurry of federal court decisions that have continued to chip away at the scope of *Roe*'s initial protections.[29] Even in states where the right is "protected," it is far from accessible to everyone.[30] The reproductive justice movement takes a more holistic approach than the rights framework.[31] It locates abortion squarely where it belongs, as part of the full reproductive life of a pregnant person, a part of and not apart from the full range of reproductive healthcare.[32]

RHEA is a piece of model legislation that was successfully passed in Oregon, and similar versions have also passed in other states.[33] In Virginia, it is sometimes challenging to pass legislation that is informed by legislation from a more progressive state. "This is Virginia, not California, not New York, not Oregon," one often hears proclaimed in the halls of the General Assembly before a bill is killed in committee or on the floor. But when it comes to the disparities in access and outcomes in reproductive healthcare for pregnant persons in the Commonwealth, we face the same kinds of problems faced in

[29] *See* Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit*, UNIV. OF CHI. SCH. OF L. (May 15, 2013), https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburgoffers-critique-roe-v-wade-during-law-school-visit (discussing how Justice Ruth Bader Ginsburg points to the location of the right to abortion in privacy as one of the problematic aspects of Roe v. Wade); Olivia B. Waxman, *Ruth Bader Ginsburg Wishes This Case Had Legalized Abortion Instead of Roe v. Wade*, TIME (August 2, 2018), https://time.com/5354490/ruth-bader-ginsburg-roe-v-wade/; *Timeline of Important Reproductive Freedom Cases Decided by the Supreme Court*, ACLU (last visited Sept. 12, 2021), https://www.aclu.org/other/timeline-important-reproductive-freedom-cases-decided-supreme-court (highlighting important decisions by the Supreme Court on reproductive freedoms through 2007). Casey and subsequent cases have reframed the right to abortion outside the strict scrutiny standard of review and the Court has upheld a whole slew of restrictions over the years. In 2016, the Whole Woman's Health v. June Medical decision seemed like a bright spot and a possible reversal of this trend, but with the new Supreme Court, that hope has been extinguished. *See* David S. Cohen, *The Narrow Victory of June Medical Might Pave the Way for Future Abortion Restrictions*, BILL OF HEALTH (July 15, 2020), https://blog.petrieflom.law.harvard.edu/2020/07/15/june-medical-abortion-restrictions-john-roberts/. For a broad overview of legislative and judicial history, *see* JON O. SHIMABUKURO, CONG. RESEARCH SERV., RL33467, ABORTION: JUDICIAL HISTORY AND LEGISLATIVE RESPONSE (2021).

[30] *See* Megan K. Donovan, *Sure, Let's Protect Roe v. Wade. But as Abortion Rights Erode, We Must Do Much More.*, USA TODAY (January 21, 2020), https://www.usatoday.com/story/opinion/2020/01/21/roe-wade-anniversary-restore-strengthen-abortion-rights-column/4522731002/.

[31] Put very simply, the reproductive rights framework focuses on an individual's legal rights to reproductive autonomy. *See Understanding Reproductive Health, Rights, and Justice*, NAT'L COUNCIL OF JEWISH WOMEN 1, https://www.ncjw.org/wp-content/uploads/2017/12/RJ-RH-RR-Chart.pdf (explaining the different frameworks in the reproductive movement).

[32] *See Reproductive Justice Briefing Book: A Primer on Reproductive Justice and Social Change*, UC BERKELEY SCH. OF L., https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=4051, for a quick primer on reproductive justice.

[33] *See* Susan Berke Fogel, *States Like Oregon Act to Ensure Access to Reproductive Care*, NAT'L HEALTH L. PROGRAM (July 14, 2017), https://healthlaw.org/states-like-oregon-act-to-ensure-access-to-reproductive-care/; *see also* Megan Burbank, *How Reproductive Health Laws Have Improved in Some States*, TEEN VOGUE (February 12, 2018), https://www.teenvogue.com/story/how-reproductive-health-laws-have-improved-in-some-states (discussing new state initiatives across the nation providing better access to reproductive health care).

other states.[34] Oregon's RHEA can serve as a valuable roadmap for a better Virginia for all.

C. Reproductive Health Equity Act (RHEA), the Basics.

In Virginia, the Reproductive Health Equity Act has taken a number of iterations.[35] Advocates for the law continue to refine both the scope and details of the Act. However, some elements are fundamental to the vision behind the Act, as determined by the coalition of reproductive health and justice advocates working on the bill.

The following elements are the agreed-upon red lines:[36]

i. Both public and private insurance plans, including Medicaid, must provide coverage for comprehensive reproductive healthcare, including contraception care AND abortion care.
ii. Access to reproductive healthcare should NOT depend on gender identity or sexuality.
iii. Access to reproductive healthcare should NOT depend on immigration status.

In addition to these red lines, the 2021 iteration of the full RHEA bill would add a mandate for both private insurance and Medicaid to cover without co-pay.[37] It would also include the same comprehensive reproductive healthcare requirements as those found in the essential healthcare benefits of the ACA, regardless of one's race, income, sexuality, gender identity, or immigration status.[38] As of the 2021 General Assembly session, the RHEA has been sent to the Virginia Health Economics Resource Center ("HERC") to evaluate the cost and efficacy of bill's provisions dealing with private insurance.[39] The process typically takes two years, so the private insurance portion of the bill is unlikely to be revisited in the 2022 legislative session.[40] It is possible that the portion of the bill dealing with public funding can pass before the section dealing with private insurance. However, both parts are

[34] *See There's Still Work to be Done in 2021*, PRO-CHOICE VA. (Jan. 18, 2021), https://naralva.org/2021/01/18/2021-reproductive-freedom/.

[35] Versions of the bill have been introduced in 2018, 2019, 2020, and 2021. The version of the bill introduced in 2021, HB 1922, is the latest version and the closest to the Oregon Model. *See* H.B. 1922, 117th Cong. (2021), for the text of the act.

[36] *See* Ashleigh Crocker, *3 Reasons We Need to Pass the Reproductive Health Equity Act*, PROGRESS VA. (January 19, 2021), https://progressva.org/news/3-reasons-we-need-to-pass-the-reproductive-health-equity-act-2/ (suggesting that while there are nuances that can change through the legislative process, these elements are not negotiable for the advocates of this bill).

[37] H.B. 1922, 2021 Gen. Assemb., Reg. Sess. (Va. 2021).

[38] *See Preventative Care Benefits for Women*, HEALTHCARE.GOV, https://www.healthcare.gov/preventive-care-women/ (last visited Sept. 12, 2021).

[39] Ashleigh Crocker, *Abortion Access Activists Host People's Hearing on Reproductive Health Equity* Act, PROGRESS VA. (Mar. 4, 2021), https://progressva.org/news/abortion-access-activists-host-peoples-hearing-on-reproductive-health-equity-act/.

[40] VA. CODE ANN. § 30-343 (2021).

imperative to the broader vision of a Virginia that respects the principles of reproductive justice for all. It should be noted that not every inequity and issue will be solved by RHEA. If passed alone, it will remove some remaining restrictions on abortion rights and reproductive healthcare access. But, it will get rid of the financial barrier to reproductive health care access faced by many.

In Virginia, like in many other states, a person's access to reproductive healthcare depends on a latticework of state and federal laws. As mentioned above, the ACA and its associated regulations provide for no-copay contraception and mandate that every plan on the exchange cover several essential healthcare services.[41] This includes reproductive healthcare services.[42] Virginia itself does not have a state no-copay contraception mandate for private healthcare plans.[43] Virginia's Medicaid system does not cover abortion care except in very particular circumstances.[44] For instance, the Federal Medicaid program pays for abortions in cases allowed by the Hyde Amendment, i.e., abortion as a result of rape, incest, and when the life of the mother is in danger.[45] Virginia, as a state, will also pay for abortions if the health of the mother is in jeopardy or if the fetus is believed to have an incapacitating physical deformity or mental deficiency.[46] While programs such as the LARC pilot and the FAMIS program, help fill the gaps in reproductive healthcare access for those without other forms of coverage, these are not comprehensive and do not cover everyone.[47] And although recent changes in the law offer some protections for transgender individuals covered by state-regulated private insurance plans, RHEA would broaden these protections.[48]

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41 *Birth Control Benefits*, HEALTHCARE.GOV, https://www.healthcare.gov/coverage/birth-control-benefits/ (last visited Sept. 12, 2021); *What Marketplace Health Insurance Plans Cover*, HEALTHCARE.GOV, https://www.healthcare.gov/coverage/what-marketplace-plans-cover/ (last visited Sept. 12, 2021).

42 *What Marketplace Health Insurance Plans Cover*, *supra*.

43 Over time, bills have been introduced to make the change, but they have not made it out of Committee. *See, e.g.*, H.D. 1481, 2018 Gen. Assemb. (Va. 2018).

44 *State Funding of Certain Abortions*, VA. DEP'T OF HEALTH, https://www.vdh.virginia.gov/pregnancy/state-funding-of-certain-abortions/ (last visited Sept. 12, 2021).

45 *See* Alina Salganicoff, et al., *The Hyde Amendment and Coverage for Abortion Services*, KAISER FAM. FOUND. (Mar. 5, 2021), https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services/.

46 VA. CODE ANN. §§32.1-92.1 to 92.2 (2021); *see State Funding of Certain Abortions*, *supra* note 44.

47 *FAMIS*, COVER VIRGINIA, https://coverva.org/en/famis; *Virginia Launches $6 Million Contraceptive Initiative*, VDH (Oct. 3, 2018), https://www.vdh.virginia.gov/news/archived-news-releases/2018-news-releases/virginia-launches-6-million-contraceptive-initiative/.

48 VA. CODE ANN. § 38.2-3449.1 (2020); *see Frequently Asked Questions: Health Insurance Protections for Transgender & Non-Binary Virginians*, EQUAL. VA., https://equalityvirginia.org/what-we-do/make-equality-%20real/trans-health-insurance-protections/ (last visited Sept. 9, 2021).

II. INCREASING REPRODUCTIVE HEALTHCARE ACCESS TO ALL IS A REPRODUCTIVE JUSTICE ISSUE AFFECTING PEOPLE ACROSS A SPECTRUM OF IDENTITIES, INCOMES, AND GEOGRAPHIES.

Reproductive justice is "the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities."[49] Access to reproductive healthcare has always been uneven across race, class, gender orientation, sexual orientation, geography, age, and immigration status.[50] For instance, when it comes to race, there is plenty of national data available showing disparities in outcomes across many other factors, including contraceptive use, Pap tests, mammograms, unintended pregnancies, and rates of teen pregnancy.[51] These disparities compound for patients who live at the intersection of multiple marginalized identities. It is beyond the scope of this paper to do a comprehensive analysis of the various barriers to access that exist for each marginalized population. Still, this section will provide a general overview. It is critical to note that the present pandemic has only exacerbated these disparities.[52]

A. ACA and the Gaps in Abortion Coverage.

The 2010 Affordable Care Act ("ACA") increased access to reproductive healthcare (except abortion) to the insured population.[53] It included a contraceptive mandate, which required no co-pay contraceptive coverage for those in qualifying plans.[54] Thanks to this alone, unplanned pregnancies declined across the U.S. population.[55] Young and minority populations saw the largest

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[49] *Reproductive Justice*, SISTER SONG, https://www.sistersong.net/reproductive-justice (last visited Sept. 9, 2021).

[50] *See, e.g.*, Usha Ranji et al., *Beyond the Numbers: Access to Reproductive Health Care for Low-Income Women in Five Communities*, KFF (Nov. 14, 2019), https://www.kff.org/report-section/beyond-the-numbers-access-to-reproductive-health-care-for-low-income-women-in-five-communities-executive-summary/; *Transgender Sexual and Reproductive Health: Unmet Needs and Barriers to Care*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Apr. 1, 2012), https://transequality.org/issues/resources/transgender-sexual-and-reproductive-health-unmet-needs-and-barriers-to-care.

[51] Madeline Sutton et al., *Racial and Ethnic Disparities in Reproductive Health Services and Outcomes*, 137 OBSTETRICS & GYNECOLOGY 225, 225 (2020); *Virginia Data*, POWER TO DECIDE, https://powertodecide.org/what-we-do/information/national-state-data/virginia (last visited Sept. 9, 2021).

[52] *See, e.g.*, Laura Linberg et al., *Early Impacts of the COVID-19 Pandemic: Findings from the 2020 Guttmacher Survey of Reproductive Health Experiences*, GUTTMACHER INST. (June 2020), https://www.guttmacher.org/report/early-impacts-covid-19-pandemic-findings-2020-guttmacher-survey-reproductive-health; *see also* Melinda Young, *Pandemic Affects Reproductive Health, Highlighting Disparities*, RELIAS MEDIA (Dec. 1, 2020), https://www.reliasmedia.com/articles/147079-pandemic-affects-reproductive-health-highlighting-disparities.

[53] *Affordable Care Act*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/health-care-equity/affordable-care-act-aca (last visited Sept. 9, 2021).

[54] *Id.*

[55] *Insurance Coverage of Contraceptives*, GUTTMACHER INST. (Sept. 1, 2021), https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives.

statistical decreases.[56] Unfortunately, this mandate does not cover all insurance plans.[57] State legislators have the ability to shore up this protection by imposing a state mandate on insurance coverage.[58] At least 29 states and the District of Columbia have already done this.[59] Of these 29 states, 16 and the District of Columbia require no co-pay coverage.[60]

The *Burwell v. Hobby Lobby Stores* decision stripped this protection from people working at "closely held corporations" with religious or moral objections to providing birth control access by allowing them to be exempt from the mandate.[61] The Trump administration promulgated regulations which the Supreme Court upheld that expanded this exemption to any nonprofit or for-profit employer, including publicly traded companies.[62]

While the Biden administration can attempt to reverse the Trump era regulations, it is uncertain whether the Supreme Court would uphold such an effort. The Court's ruling was based on procedural grounds, whether the government had the right to make the rule, rather than on constitutional grounds, whether the exemption is constitutionally required.[63] States can take action on plans they have the authority to regulate.[64] However, federal law applies to all plans, while state law only applies to individual plans and fully-insured group plans.[65] The federal law does not preempt states' ability to add requirements over the state-controlled insurance plans.[66] Therefore, states can mandate coverage for contraception and abortion for the plans over which they have control.

B. Virginia Gaps in Abortion Coverage.

Virginia's pregnant persons don't have consistent coverage for abortion. If you are pregnant and low-income, on Medicaid or would financially qualify for Medicaid, and are a citizen or a Green Card holder (lawful permanent resident) with five years or more of residency in the United States, you can

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56 Susan Christiansen, *The Impact of The Affordable Care Act Contraceptive Mandate on Fertility and Abortion Rates* (Dec. 2020), (Ph.D. dissertation, Johns Hopkins University) (on file with author).

57 *Insurance Coverage of Contraceptives*, *supra* note 55.

58 *Id.*

59 Laurie Sobel et al., *State and Federal Contraceptive Coverage Requirements: Implications for Women and Employers*, KFF (Mar. 29, 2018), https://www.kff.org/womens-health-policy/issue-brief/state-and-federal-contraceptive-coveragerequirements-implications-for-women-and-employers/.

60 *Insurance Coverage of Contraceptives*, *supra* note 55.

61 Burwell v. Hobby Lobby Stores, 573 U.S. 682, 683–87 (2014).

62 Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367, 2370 (2020).

63 *Id.* at 2367–70.

64 Sobel, *supra* note 59.

65 *Id.*; Richard Cauchi & Steve Landess, *2011-2014 Health Insurance Reform Enacted State Laws Related to the Affordable Care Act*, NAT'L CONF. ON STATE LEGISLATORS (June 17, 2014), https://www.ncsl.org/research/health/health-insurance-reform-state-laws-2013.aspx.

get abortion coverage only in the aforementioned narrow cases.[67] And to obtain this coverage, you have to pre-qualify for it.[68] It is not available retroactively.[69] Very few abortions are covered by either federal Medicaid funding or state funding in Virginia each year.[70] In all other circumstances, unless a patient's private insurance covers abortion,[71] the patient has to pay out of pocket or rely on one of Virginia's abortion funds to fund the procedure.[72]

Geography plays another part in the matrix of influences on one's ability to access comprehensive reproductive healthcare. Across the country and in Virginia, Catholic and other religious healthcare institutions have been acquiring an increasing share of the market, effectively displacing secular hospitals.[73] While these institutions may provide excellent all-around care, many religious health organizations, including Catholic hospital groups, place limits on the procedures that can be made available at the hospital when it comes to reproductive healthcare.[74] This can include abortion, tubal ligation, and other procedures.[75] So, in addition to facing the high cost of abortion care in general, a patient may have to face the additional burden of traveling outside their area to even find a provider willing to perform the procedure if a pregnancy is far enough along and there are no providers in one's area providing abortion care. This, of course, increases the time and cost of an abortion because it requires longer travel to an area with an abortion provider.

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67 *See Information for Noncitizens*, DEP'T OF MED. ASSIST. SERVS., https://www.dmas.virginia.gov/for-applicants/information-for-noncitizens/ (last visited Sept. 11, 2021); *State Funding of Certain Abortions*, *supra* note 44.

68 *See id.; Information for Noncitizens, supra note 67.*

69 *See Information for Noncitizens*, *supra* note 67; *State Funding of Certain Abortions*, *supra* note 44.

70 The Department of Medical Assistance Services does not collate this data publicly. However, the Virginia Pro-Choice Coalition cited the Virginia Department of Health when informing the General Assembly that there have been fewer than 100 abortions covered under these provisions from 2015-2018. *See Restricting Abortion Funding in Case of Fetal Anomaly*, VA. PRO-CHOICE COAL., https://virginia.prochoiceamericaaffiliates.org/wp-content/uploads/sites/12/2019/01/Fetal-Anomaly-Fact-Sheet.pdf (last visited Sept. 19, 2021) (stating that fewer than 30 applications for fetal anomaly coverage were approved each year from 2015-2018).

71 Masters, *supra* note 15. Until July 2021, this coverage could not even be made available on the state insurance exchange.

72 *State Funding of Certain Abortions*, *supra* note 44 (listing the following as local abortion funding organizations: Richmond Reproductive Freedom, Project DC Abortion Fund, Blue Ridge Abortion Fund, New River Abortion Access Fund, Hampton Roads Reproductive Justice League).

73 *See* Lindsay K. Admon & Jennifer Villavicencio, *Catholic Hospitals, Patient Autonomy, and Sexual and Reproductive Health Care in the United States*, JAMA NETWORK OPEN (Jan. 29, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2759754; Debra Stulberg & Lori Freedman, *How Catholic Hospitals Restrict Reproductive Health Services*, SCHOLARS STRATEGY NETWORK (May 30, 2016), https://scholars.org/contribution/how-catholic-hospitals-restrict-reproductive-health-services.

74 Admon & Villavicencio, *supra* note 73.

75 Debra B. Stulberg et al., *Tubal Ligation in Catholic Hospitals: A Qualitative Study of OB-GYNS' Experiences*, 90 CONTRACEPTION 422, 422–23 (2014).

Universal access to comprehensive reproductive healthcare does not only have positive effects on the rest of one's health and welfare, but it also positively impacts society as a whole.[76] Individuals without access to comprehensive reproductive healthcare, including abortion care, face a number of challenges.[77] These include economic, physical, and mental health consequences that can plague a pregnant person throughout their entire life.[78]

III. WHY MANDATE ABORTION COVERAGE?

The following section will discuss portions of the RHEA bill that are pillars of the bill and some of the more challenging aspects when it comes to ultimate passage. Taxpayer funding for abortion has faced public opposition from all sides of the political spectrum, though the tides are changing.[79] According to the American College of Gynecologists and Obstetricians, one-quarter of women will receive an abortion in the United States by 45.[80] Furthermore, the majority of those receiving an abortion identify as Hispanic, Black, Asian, or Pacific Islander.[81] The majority of people seeking abortion, 75%, are living at or below 200% of the federal poverty level.[82] In other words, the most marginalized communities are also those most in need of abortion care. And yet, this common and safe medical procedure is not covered by Medicaid and many private insurance plans, making it difficult to access for many.

A key impediment to abortion access for the most marginalized communities is the Hyde Amendment, a federal budget rider re-affirmed by each Congress since the first time this amendment passed, prohibiting federal

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[76] *See* Susan A. Cohen, *The Broad Benefits of Investing in Sexual and Reproductive Health*, GUTTMACHER POL'Y REV. (Mar. 2004), https://www.guttmacher.org/gpr/2004/03/broad-benefits-investing-sexual-and-reproductive-health.

[77] *See* Caitlin Gerdts et al., *Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth after an Unwanted Pregnancy*, 26 WOMEN'S HEALTH ISSUES 55, 55–59 (2016); Lauren J. Ralph et al., *Self-reported Physical Health of Women Who Did and Did Not Terminate Pregnancy After Seeking Abortion Services*, 171 ANNALS OF INTERNAL MED. 238, 245–46 (2019); *see also* Diana Greene Foster et al., *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J. OF PEDIATRICS 183, 187–88 (2019); Corinne H. Rocca et al., *Emotions Over Five Years After Denial of Abortion in the United States: Contextualizing the Effects of Abortion Denial on Women's Health and Lives*, 269 SOC. SCI. & MED. 1, 6–7 (2021).

[78] *See generally* DIANA GREENE FOSTER, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING – OR BEING DENIED - AN ABORTION 6–7 (2020).

[79] Abigail R.A. Aiken & James Scott, *Family Planning Policy in the United States: The Converging Politics of Abortion and Contraception*, 93 CONTRACEPTION 412, 412–13 (2016); Salganicoff, *supra* note 45.

[80] *Increasing Access to Abortion*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (Dec. 2020), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2020/12/increasing-access-to-abortion.

[81] *Id*.

[82] *Id*.

public funding from going towards most abortion care.[83] A long-overdue conversation about the Hyde Amendment spilled over into the 2020 Presidential campaign.[84] President Biden and the vast majority of the Democrats in the House of Representatives arrived at the conclusion that it should be repealed, much like the abortion gag rules for federal funding and foreign aid.[85] It bears often repeating that the Hyde Amendment is fundamentally classist and racist.[86] These characteristics are not unintended consequences but integral to its design and intended effect.[87] To reverse the adverse effects of Hyde, the state can and should come in to fill the gaps in coverage created by Hyde. The most recent House of Representatives budget proposal and the President's budget left out the Hyde Amendment, though the United States Senate reinstated the provision.[88]

Not all states have their own state version of Hyde, but Virginia does.[89] If you are a state employee in Virginia, your insurance will not cover abortion care.[90] If you were getting your insurance on the state ACA exchange until July 2021, your insurance plan was not allowed to cover abortion care.[91] If you are on Medicaid, you're also out of luck in the vast majority of circumstances, with the aforementioned tiny exceptions affecting but a few people.[92] Lack of coverage can severely hinder your access to care because abortions are not inexpensive, whether medication abortion or procedural abortion.[93] Without coverage, it can take time to obtain the funds necessary to have an abortion, forcing the patient to postpone the procedure. Abortions later in

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83 *See* Marlene Gerber Fried, *The Hyde Amendment: 30 Years of Violating Women's Rights*, CTR. FOR AM. PROGRESS (Oct. 6, 2006), https://www.americanprogress.org/issues/women/news/2006/10/06/2243/the-hyde-amendment-30-years-of- violating-womens-rights/.

84 Katie Gluek, *Joe Biden Denounces Hyde Amendment, Reversing His Position*, N.Y. TIMES (Jun 6, 2019), https://www.nytimes.com/2019/06/06/us/politics/joe-biden-hyde-amendment.html.

85 Benjamin Siegel & Mary Alice Parks, *Democrats Advance Spending Bill That Would Overturn the Hyde Amendment*, ABC NEWS (July 12, 2021), https://abcnews.go.com/Politics/democrats-advance-spending-bill-overturn-hyde-amendment/story?id=78805054.

86 *The Hyde Amendment: A Discriminatory Ban on Insurance Coverage of Abortion*, GUTTMACHER INSTIT. (May 2020), https://www.guttmacher.org/fact-sheet/hyde-amendment.

87 *Id*.

88 *See* S. Amndt. 3782 to S. Con. Res. 14, 117 Cong. (2021) (enacted), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=117&session=1&vote=00336 (reinstating provision concerning abortion funding similar to Hyde).

89 Both the Virginia Law and the Hyde Amendment enforce similar restrictions on abortions. *See State Facts About Abortion: Virginia*, GUTTERMACHER INST. (2021), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-virginia.

90 *Id*.

91 Masters, *supra* note 15.

92 *State Funding of Certain Abortions*, *supra* note 44.

93 Sarah Roberts et al., *Out-of-Pocket Costs and Insurance Coverage for Abortion in the United States*, 24-2 WOMEN'S HEALTH ISSUES e211, e211 (2014).

pregnancy become more expensive and involve more risks of complications.[94]

A. Impacts of the Lack of Coverage

Ensuring access to abortion care for everyone is good for patients and good for society. There has been a plethora of research showing that abortion restrictions cause actual harm.[95] The lack of coverage hits low-income patients and people of color the hardest.[96] Patients without coverage who have to spend time getting together the money to pay for an abortion, whether by borrowing, saving, or foregoing other essential expenses, will often get the procedure later in pregnancy, as gathering resources takes time.[97] This leads some patients to need abortion care later in pregnancy, increasing both the costs and risks.[98]

Research also shows positive healthcare and wellbeing outcomes for patients in states where abortion care is covered by Medicaid, private insurance, or a combination of the two.[99] The example of Oregon's RHEA is illustrative but hardly the only one.[100] In sixteen states, Medicaid covers all or almost all necessary abortion care, some voluntarily while others due to a court order.[101] In Oregon, the increased Medicaid coverage for abortion services has increased overall access.[102] It has also increased the number of abortions by

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94 Meera Jagannathan, *Mandatory Waiting Periods Can Make Abortions Nearly $1,000 More Expensive*, MKT. WATCH (Sept. 25, 2019) https://www.marketwatch.com/story/mandatory-waiting-periods-can-make-abortions-nearly-1000-more-expensive-2019-09-10.

95 *See, e.g.*, *Maternal Health and Abortion Restrictions: How Lack of Access to Quality Care Is Harming Black Women*, NAT'L P'SHIP FOR WOMEN AND FAMILIES (Oct. 2019), https://www.nationalpartnership.org/our-work/resources/repro/maternal-health-and-abortion.pdf.

96 Jessica Arons & Madina Agénor, *Separate and Unequal: The Hyde Amendment and Women of Color,* CTR. FOR AM. PROGRESS (Dec. 2010), https://cdn.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/hyde_amendment.pdf.

97 Diana Greene Foster et al., *What Happens After an Abortion Denial? A Review of Results from the Turnaway Study*, 110 AEA PAPERS AND PROC. 227, 227 (2021).

98 *Id.*

99 Amanda Dennis et al., *Does Medicaid Coverage Matter? A Qualitative Multi-State Study of Abortion Availability of Low-Income Women*, 25 J. HEALTH CARE FOR POOR AND UNDERSERVED 4, 1581–82 (Nov. 2014).

100 Molly Rosbach, *Oregon Medicaid Expansion Helped More Women Access Insurance Coverage for Abortion Services, OSU Study Finds*, OR. STATE UNIV. (Jan. 13, 2021), https://today.oregonstate.edu/news/oregon-medicaid-expansion-helped-more-women-access-insurance-coverage-abortion-services-osu.

101 *State Funding of Abortion Under Medicaid*, GUTTERMACHER INST. (Aug. 1, 2021), https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid.

102 Molly Rosbach, *Oregon Medicaid Expansion Helped More Women Access Insurance Coverage for Abortion Services*, *OSU Study Finds*, OR. STATE UNIV., (Jan. 14, 2021), https://synergies.oregonstate.edu/2021/oregon-medicaid-expansion-helped-women-access-coverage-for-abortion-services-osu-study/.

medication, which can be indicative of an increase in abortions earlier in pregnancy as opposed to later.[103]

When access to abortion care is restricted by things like a lack of coverage for abortion care, individuals and their families suffer. Failure to obtain an abortion one needs has significant negative consequences both on the patient and their family.[104] One longitudinal study showed that over time women unable to obtain an abortion and forced to give birth "were more likely to rate their overall health as "fair" or "poor," instead of "good" or "very good."[105] The "Turn Away Study," the first comprehensive study of the long-term consequences of either having or being denied an abortion, showed, among other things, that patients who were denied an abortion face the following negative consequences: They are four times more likely than those who are able to get an abortion to live below the Federal Poverty Line. They are "more likely to experience serious complications from the end of pregnancy including eclampsia and death." They are more likely to stay with abusive partners. They are more likely to experience anxiety and loss of self-esteem. They are less likely "to have aspirational life plans for the coming year." And they are "[m]ore likely to experience poor physical health for years after the pregnancy, including chronic pain and gestational hypertension."[106] The negative consequences of being denied an abortion are not limited to the pregnant person themselves but also affect "the children born of unwanted pregnancy, as well as for the existing children in the family."[107] Other studies have shown that reduced access can negatively affect maternal health outcomes, including death.[108]

Improving access to abortion coverage will lift some of the impediments to access, which in turn will ensure that fewer patients who want and need abortion care have to go without it and therefore suffer the negative consequences of carrying to term an unplanned pregnancy that could have been prevented through timely affordable abortion access. More accessible abortion healthcare has other, broader positive economic outcomes for women.[109]

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[103] *Id*.

[104] *Id*.

[105] Nicoletta Lanessa, *Women Denied Abortions May Endure Long-Term Health Consequences*, UNIV. OF CAL. S.F., (June 18, 2019), https://www.ucsf.edu/news/2019/06/414706/women-denied-abortions-may-endure-long-term-health-consequences.

[106] ANSIRH, *The Turnaway Study*, UNIV. OF CAL. S.F., https://www.ansirh.org/research/ongoing/turnaway-study (last visited Sep. 9, 2021).

[107] *Id*.

[108] Anusha Ravi, *Limiting Abortion Access Contributes to Poor Maternal Health Outcomes,* CTR. FOR AM. PROGRESS, (June 13, 2018), https://www.americanprogress.org/issues/women/reports/2018/06/13/451891/limiting abortion-access-contributes-poor-maternal-health-outcomes/.

[109] Anna Bernstein & Kelly M. Jones, *The Economic Effects of Abortion Access: A Review of the Evidence*, INST. FOR WOMEN'S POL'Y RSCH. (July 18, 2019), https://iwpr.org/iwpr%20issues/reproductive-health/the-economic-effects-of-abortion-access-a-review-of-the-evidence/.

One review of the literature showed, that access to abortion could help Black women have more control over their reproductive lives, including reducing pregnancy allowing them to attain better economic and educational outcomes.[110]

Any version of the RHEA supported by the reproductive justice, health, and rights community in Virginia must include coverage for abortion care for low-income individuals. Everyone should be able to reap the positive effects of having control over their reproductive destiny. Even if the right to abortion stands federally and restrictions are lifted, without access to abortion, the right is a right in name only. With the continued restrictions on federal Medicaid funding, Virginia will have to spend state money on abortion coverage. This undoubtedly will be a tough political fight. But it is a fight worth having.

B. Expanding Healthcare Coverage for Undocumented Immigrants

Undocumented immigrants in Virginia have access to forms of reproductive healthcare during limited and specific portions of their lives.[111] Just as their access to care and coverage is limited on the federal level, even if Medicaid is expanded to cover abortion, it will not be available to undocumented immigrants.[112] Lawfully residing immigrants don't have full coverage either.[113] It varies depending on one's specific immigration status. Permanent residents who have been here less than five years and who may be eligible for pregnancy-related Medicaid/CHIP are nevertheless not eligible for reproductive healthcare coverage.[114] Undocumented individuals in Virginia and throughout the United States are ineligible for pregnancy-related CHIP and the federal Medicaid program.[115] They are also unable to obtain subsidized or unsubsidized coverage on the ACA exchange.[116]

While the ACA expanded reproductive healthcare coverage, it did not help many immigrant families. The ACA did not create a five-year-waiting-period exemption for nonpregnant adults who meet the income eligibility requirements for coverage.[117] This means that parental and ACA expansion Medicaid coverage is limited to citizens and lawfully residing non-citizens with

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[110] *Id*.

[111] *See Virginia Medicaid Announces New Coverage for Pregnant Virginians*, DEPT. OF MEDICAID ASSISTANCE SERVS., (July 20, 2021), https://www.dmas.virginia.gov/media/3665/new-coverage-pregnant-virginians.pdf.

[112] JENNIFER M. HALEY ET AL., URB. INST., THE PUBLIC HEALTH INSURANCE LANDSCAPE FOR PREGNANT AND POSTPARTUM WOMEN 7 (2021).

[113] *Id*. at v–vii.

[114] *Id*.

[115] *Health Coverage of Immigrants*, KAISER FAM. FOUND. (July 15, 2021), https://www.kff.org/racial-equity-and-health-policy/fact-sheet/health-coverage-of-immigrants/.

[116] *Id*.

[117] HALEY, *supra* note 112 at 13.

five years' residency. Now, in addition to the pre-existing restrictions, women who receive coverage under the unborn-child option, including undocumented immigrant women, no longer qualify for subsidized coverage as parents after their pregnancy-related eligibility expires.[118] The ACA and subsequent Medicaid expansion in some states have made lawfully residing new mothers with fewer than five years' residency who qualify for pregnancy-related Medicaid/CHIP ineligible to obtain Medicaid as a parent.[119] Currently, only six states and the District of Columbia spend state money to cover some nonpregnant undocumented immigrants.[120]

As a result of these policies, undocumented immigrants and their children are more likely to be uninsured.[121] For example, in 2019, of the non-elderly population, while only 9% of citizens were uninsured, the rate of uninsured among lawfully present immigrants was 25%, and among undocumented immigrants, a distressing 46%.[122] Citizen children with at least one non-citizen parent are also more likely to be uninsured than those with citizen parents.[123] This lack of coverage negatively impacts reproductive health. Undocumented individuals who do not have insurance have access to fewer preventative services such as prenatal care and report poorer reproductive health outcomes.[124] Data from 2016 shows a wide gap in the rate of access to contraception care between immigrant women (half of whom received care) and women born in the U.S (two-thirds of whom received care).[125] Because of the lack of access to care, immigrant women face higher rates of unintended pregnancy and are also less likely to receive preventative care, including cervical cancer screenings. This has resulted in higher rates of cervical cancer and preventable deaths among immigrant women and the associated preventable deaths.[126] Anti-immigrant policies enforced by many states compound the effects of the lack of available coverage of.[127] The Trump administration's concerted attack on documented and undocumented immigrants has made many immigrants

[118] *Id*.

[119] *Id*.

[120] *Id*.

[121] *Id*. at 2, 10.

[122] *Health Coverage of Immigrants*, *supra* note 115.

[123] *Id*.

[124] *Health Care for Unauthorized Immigrants*, AM. C. OF OBSTETRICIANS AND GYNECOLOGISTS (Mar. 2015), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2020/12/increasing-access-to-abortion.pdf.

[125] NATIONAL WOMEN'S LAW CENTER, IMMIGRANT RIGHTS AND REPRODUCTIVE JUSTICE: HOW HARSH IMMIGRATION POLICIES HARM IMMIGRANT HEALTH 2 (2017).

[126] *Id*.

[127] *See* Krista M. Perreira & Juan M. Pedroza, *Policies of Exclusion: Implications for the Health of Immigrants and Their Children*, 40 ANN. REV. OF PUB. HEALTH 147 (2019).

hesitant to seek healthcare, including reproductive healthcare, for fear of adverse immigration consequences.[128]

Ensuring that all people, regardless of their immigration status, receive access to comprehensive reproductive healthcare is more than just a matter of ethical and moral necessity. There are tangible benefits to society in ensuring that immigrant families have the healthcare they need, such as increasing the population's overall health, reducing emergency room visits and improving the integration of immigrants, with documentation or without, into American society and culture.[129] With better access to healthcare comes an increased ability to actively participate in the economy and civic life. In Oregon, expanding healthcare coverage to include undocumented mothers increased their ability to see the doctor for prenatal care, which led to higher rates of prenatal screenings for potential problems and a subsequent decrease in low-birth-weight rates and child mortality.[130]

Ensuring healthcare coverage for documented and undocumented immigrants will have a significant positive impact on Virginia's population. Immigrants form an integral and significant portion of the population living in Virginia. There were an estimated 275,000 undocumented immigrants in Virginia in 2016 and 1.1 million immigrants total in 2018.[131] These individuals work, live, and pay taxes in every part of the state. Between 2010 and 2014, 326,492 people in Virginia, including 143,300 U.S. citizens, lived with at least one undocumented family member.[132] And about one in 20 children in the state was a U.S. citizen living with at least one undocumented family member (98,768 children in total).[133] The arguments against providing coverage and access to public benefits are largely based on myths and prejudice. 1 in 6 working Virginians was an immigrant (including documented, undocumented, and naturalized) in 2018.[134] Many undocumented immigrants pay

[128] *See* NATIONAL WOMEN'S LAW CENTER, *supra* note 125 at 1.

[129] *Health Care for Unauthorized Immigrants*, *supra* note 124; *The True Healthcare Costs of Undocumented Immigrants*, U MAG., https://www.uclahealth.org/u-magazine/the-true-healthcare-costs-of-undocumented-immigrants; Arturo Vargas et al., *Integrating Immigrants into the U.S. Health System*, 14 AM. MED. ASS'N J. ETHICS, https://journalofethics.ama-assn.org/article/integrating-immigrants-us-health-system/2012-04 (Apr. 2012).

[130] Asees Bhasin, *Moms & Babies Series: A Systemic Failure--Immigrant Moms and Babies are Being Denied Healthcare*, NAT'L P'SHIP FOR WOMEN & FAM., https://www.nationalpartnership.org/our-work/resources/health-care/immigrant-moms-and-babies-denied.pdf (last visited Sept. 12, 2021).

[131] *Immigrants in Virginia*, AM. IMMIGRATION COUNCIL (Aug. 6, 2020), https://www.americanimmigrationcouncil.org/research/immigrants-in-virginia.

[132] *Id*.

[133] *Id*.

[134] *Id*.

taxes.[135] Undocumented immigrants are important parts of the economic fabric of this country.[136]

In 2016, 5% of the workforce in Virginia was comprised of undocumented immigrants.[137] Although in 2021, Virginia expanded its FAMIS program to include undocumented women, FAMIS coverage is minimal.[138] It is geared primarily towards covering children under 19 and providing prenatal coverage for pregnant and postpartum women up to 2 months after pregnancy.[139] It is no substitute for comprehensive reproductive healthcare. Solving the systemic and legal problems plaguing our immigration system is far outside the scope of this paper. However, it is important that as a part of expanding reproductive healthcare access to everyone, we do not leave out the most vulnerable populations, including the immigrant population currently without healthcare coverage. Providing the same coverage to documented and undocumented immigrants is a pillar of RHEA because keeping vital care out of reach of marginalized communities is morally wrong and because doing so is not in the public interest of Virginia as a whole.

C. Why End Discrimination in Reproductive Healthcare Against Transgender Individuals?

> People of all genders have sexual and reproductive health needs, including women, transgender people, nonbinary people, and those who are otherwise gender-diverse.[140]

Transgender patients face a considerable number of barriers to comprehensive reproductive healthcare access and access to healthcare more generally. This is especially true for transgender people of color.[141] Requiring nondiscriminatory coverage won't solve all of them. It will not solve the problems of prejudice in the medical system and the difficulty in finding gender-affirming care.[142] However, it can go a long way towards alleviating some of

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[135] CONG. BUDGET OFFICE, A SERIES ON IMMIGRATION: THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGET OF STATE AND LOCAL GOVERNMENTS (2007), https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/12-6-immigration.pdf.

[136] *See The Effects of Immigration on the United States*, PENN WHARTON UNIV. OF PA. BUDGET MODEL (June 27, 2016), https://budgetmodel.wharton.upenn.edu/issues/2016/1/27/the-effects-of-immigration-on-the-united-states-economy.

[137] *Immigrants in Virginia*, *supra* note 131.

[138] *Health Coverage for Non-Citizens*, COVER VA., https://coverva.org/en/health-coverage-for-non-citizens (last visited Sept. 10, 2021).

[139] *FAMIS Moms*, COVER VA., https://coverva.org/en/famis-moms (last visited Sept. 10, 2021).

[140] *Increasing Access to Abortion*, *supra* note 80.

[141] Susanna D. Howard et al., *Healthcare Experiences of Transgender People of Color*, J. GEN. INTERNAL MED. 2068, 2073 (Aug. 5, 2019).

[142] *See generally* Sari L. Reisner et al., *Integrated and Gender-Affirming Transgender Clinical Care and Research*, 72 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME S235, S238 (Supp. 3 Aug. 15, 2016), (defining gender-affirmative health care as health care that holistically attends to transgender people's physical, mental, and social health needs and well-being while respectfully affirming their gender identity).

the financial worries involved in obtaining and maintaining the care transgender patients need. Ensuring non-discriminatory coverage may increase the number of available providers. Insurance coverage is not even across the board. Not all insurance providers adequately cover gender-affirming healthcare.[143] It is likely that the already limited pool of affirming healthcare providers is further limited by the coverage available. Transgender rights are under attack across the country.[144] Reproductive healthcare is no exception.

When it comes to reproductive healthcare, transgender people are likely to face a large number of sometimes insurmountable obstacles to receiving care. These obstacles include the fact that there are few medical professionals specializing in trans care, a lack of insurance coverage for such care and, in addition to a general lack of an economic and social safety net, active discrimination inside and outside medical practice. [145] This lack of access is compounded by the other issues facing the transgender community. In the U.S., being transgender means one is more likely to live below the poverty line and experience higher rates of homelessness, sexual and physical assault, and discrimination in public accommodations and employment. [146] In addition, being transgender in the healthcare setting means dealing with systemic oppression by medical professionals, including "inappropriate care, care refusal, and mistreatment by health providers."[147]

The Supreme Court recently affirmed that discrimination based on gender is a prohibited form of sexual discrimination in the realm of employment law.[148] While there isn't the same level of scrutiny on public and private insurance healthcare coverage, there certainly should be. Discrimination in insurance coverage when it comes to the LGBTQ+ community has not been

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143 Caroline Medina et al., *Protecting and Advancing Health Care for Transgender Adult Communities*, CTR. FOR AM. PROGRESS (Aug. 2021), https://cdn.americanprogress.org/content/uploads/2021/08/16055541/Advancing-Health-Care-For-Transgender-Adults.pdf?_ga=2.215078229.315537357.1631405133-855971338.1631405133.

144 *See* Harper B. Keenan & Z Nicolazzo, *Trans Youth Are Under Attack. Educators Must Step Up*, EDUC. WEEK (Apr. 8, 2021), https://www.edweek.org/leadership/opinion-trans-youth-are-under-attack-educators-must-step-up/2021/04; *see also* Wyatt Ronan, *2021 Officially Becomes Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures Into Law*, HUMAN RIGHTS CAMPAIGN (May 7, 2021), https://www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law.

145 NAT'L ORG. FOR WOMEN, TRANSGENDER HEALTHCARE AND REPRODUCTIVE JUSTICE 2–3(2018), https://now.org/wp-content/uploads/2018/04/Transgender-Healthcare.pdf.

146 Ethan C. Cicero et al., *Healthcare Experiences of Transgender Adults: An Integrated Mixed Research Literature Review*, ADVANCES IN NURSING SCI. 2 (Apr. 1, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6502664/pdf/nihms-1009500.pdf.

147 *Id*.

148 Bostock v. Clayton County, Ga., 140 S.Ct. 1731, 1737 (2020).

extensively tested in the courts and has not been given the same kind of media attention as other forms of discrimination. Equity and equality in access to reproductive healthcare are as important as equal treatment in the workplace to a person's overall health and welfare. It is time for Virginia's laws to catch up to our morals and to ensure that both public and private healthcare coverage does not discriminate based on a person's gender identity or sexuality.

IV. RHEA IS NOT THE LAST WORD IN REPRODUCTIVE RIGHTS AND JUSTICE IN VIRGINIA: WHAT MORE NEEDS TO BE DONE

This article is being written as reproductive rights are on a precipice with the Supreme Court. The first direct assault on Roe has been filed with the Court in Jackson v. Mississippi.[149] The plaintiffs have stepped outside the usual anti-abortion strategy, no longer hiding behind the fig-leaf of a concern for women's healthcare or safety. They are asking the court to overturn Roe entirely, sending America's reproductive rights to a time before 1973. In Virginia, as of this writing – before the 2021 Gubernatorial and House of Delegates Election, the Commonwealth is on the eve of an election that has the potential to either move the state forward or undo the progress done before. As two parties vie for the House of Delegates, the Lieutenant Governor, Governor, and Attorney General Offices, the achievements of 2020 and 2021 stand in the balance. In the Senate, pro-choice policies currently enjoy the narrowest of majorities, with pro-choice legislation often requiring the Lieutenant Governor's tie-breaking vote to pass.[150] It reminds us and should remind everyone, how quickly Virginia politics can change the tides of policy. After all, just in 2018 and 2019, the passage of something like the Reproductive Health Protection Act was downright laughable. And so, should the pro-choice majority hold, in addition to the passage of the RHEA, it is important also to shore up the protection of the right to abortion itself.

A. RHEA Will Not Decriminalize Abortion in Virginia or Codify Abortion Rights on its Own.

As in many other states, in Virginia, abortion was a crime in all of its forms prior to 1973, when the Supreme Court decided *Roe*.[151] Post *Roe*, some states took the approach of removing abortion from the criminal code and placing

[149] See Emily Wagster Pettus, *Mississippi Argues Supreme Court Should Overturn Roe v. Wade*, AP NEWS (July 22, 2021), https://apnews.com/article/health-abortion-us-supreme-court-mississippi-57342eb0af27efe5c7cda5062105bd7f.

[150] Barbara Rodriguez, *These Two Women Have Potential to Play Outsized Role in Va. Abortion Rights*, THE CUT (Sept. 16, 2021), https://www.thecut.com/2021/09/two-women-could-have-potential-tie-breaking-vote-on-abortion-rights-in-virginia.html.

[151] *See What if Roe Fell?*, CTR. FOR REPROD. RTS., https://maps.reproductiverights.org/what-if-roe-fell?state=VA (last visited Sept. 18, 2021).

it in the civil code or entirely eliminating restrictions.[152] Others, like Virginia, created exceptions to the criminal code on abortion consistent with the states' interpretation of *Roe*.[153] Thus, abortion remains in the criminal code in Virginia and is not protected explicitly as a right in either Virginia's Code or the Virginia Constitution.[154] To afford reproductive rights protection going forward, Virginia should remove abortion from the criminal code - where it does not belong - and enshrine the right to reproductive freedom in law. Virginia must either do these two things together or decriminalize abortion first and codify second.

The criminalization of abortion is extensive in the Code, even after the positive changes made in 2020 and 2019. Virginia's abortion law can be found in Chapter 4: Crimes Against the Person, under Article 9. The Code enacted in 1950, as subsequently amended in the '60s and '70s, reads:

> Except as provided in other sections of this article, if any person administer to, or cause to be taken by a woman, any drug or other thing, or use means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and thereby destroy such child, or produce such abortion or miscarriage, he shall be guilty of a Class 4 felony.[155]

The consequences of performing an abortion or terminating a pregnancy in violation of the law are dire. A Class 4 felony is a crime punishable by "a term of imprisonment of not less than two years nor more than 10 years and, subject to subdivision (g), a fine of not more than $100,000."[156] Should a doctor, or any individual stray outside the parameters expressly delineated in this section of the Code, they will face a potential two-year prison sentence as a result.[157]

After the passage of the RHPA, there are still restrictions that remain enshrined in the abortion criminal statute. The exceptions to § 18.2-71 include abortion performed by a physician or a nurse practitioner during the first trimester.[158] Physician's assistants cannot perform even a medication abortion in Virginia, a medically nonsensical prohibition.[159] The criminal statute also exempts abortion performed during the second trimester of pregnancy by a

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[152] *See e.g.*, Abraham Kenmore, *N.Y. Removes Abortion From Criminal Code*, ADIRONDACK DAILY ENTERPRISE (Jan. 23, 2019), https://www.adirondackdailyenterprise.com/news/local-news/2019/01/n-y-removes-abortion-from-criminal-code/.

[153] Anne Godlasky et al., *Where is Abortion Legal? Everywhere. But…*, USA TODAY (Apr. 23, 2020), https://www.usatoday.com/in-depth/news/nation/2019/05/15/abortion-law-map-interactive-roe-v-wade-heartbeat-bills-pro-life-pro-choice-alabama-ohio-georgia/3678225002/.

[154] *Abortion Access*, NARAL PRO-CHOICE VA., https://naralva.org/issue/abortion-access (last visited Sept. 18, 2021).

[155] VA. CODE ANN. §18.2-71 (2021).

[156] VA. CODE ANN. §18.2-10(d) (2021).

[157] VA. CODE ANN. §18.2-71 (2021).

[158] VA. CODE ANN. § 18.2-72 (2021).

[159] *See id.*

physician licensed by the Virginia Department of Health. Second-trimester abortions are no longer required to be performed in a hospital as of the decision in *Falls Church v. Oliver*, but so long as this provision remains in the Code, it will continue to create doubt and confusion for providers unfamiliar with the ruling, especially providers who have not traditionally performed abortion care but might decide to do so following RHPA.[160] RHPA also allows for abortion after the second trimester if three physicians determine that the abortion is necessary to avoid the death of the woman or substantially and irremediably impair the mental or physical health of the woman or to save a woman's life.[161] This means that even when the need for an abortion is clear to one physician and their patient, two more physicians still have to sign off, unnecessarily increasing the cost of the procedure and the emotional toll of the experience on the patient.

The informed consent requirements for abortion, which have been pared down with the Reproductive Health Protection Act, can also be found in the criminal chapters.[162] As is the section making it a Class 3 misdemeanor for any "person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or through the use of a referral agency for profit, or in any other manner, encourage or promote the performing of an abortion or the inducing of a miscarriage in this Commonwealth which is prohibited" under the Code. [163] While the Supreme Court reaffirmed that commercial speech, including advertising for abortion, is protected by First Amendment in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*, removing the law from the books will create more assurance that it will not become relevant again in the future, should the Supreme Court change its mind.[164]

In theory, the criminal liability in these statutes should not apply to the woman herself and should instead apply only to external third parties, such as a doctor or other medical provider or friend or family member, should they walk outside the margins of the Code. However, there has been a disturbing trend around the country and even right here in the Commonwealth of anti-abortion, anti-woman officials seeking to prosecute pregnant women for their pregnancy outcomes.[165] Even the statute's plain language excluding the application to the pregnant person is not always respected by either the courts

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[160] *See* Falls Church Medical Ctr. v. Oliver, 346 F.Supp.3d 816 (E.D. Va. 2019); VA. CODE ANN. § 18.2-73 (2021).

[161] VA. CODE ANN. § 18.2-74(b) (2021); *see* VA. CODE ANN. § 18.2-74.1 (2021).

[162] *See* VA. CODE ANN. § 18.2-76 (2021).

[163] VA. CODE ANN. § 18.2-76.1 (2021).

[164] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 759-60 (1976).

[165] Galina Varchena et al., *The Rising Trend Of Criminalizing Pregnancy Is Turning Everyone Into Suspects*, BUSTLE (Aug. 16, 2018), https://www.bustle.com/p/the-rising-trend-of-criminalizing-pregnancy-is-turning everyone-into-suspects-10115792.

or prosecutors. For example, a woman in Chesterfield, VA, was charged with self-abortion after a fetus was discovered buried in her backyard.[166] The charges were not dropped because the judge or prosecutor acknowledged that they went against the law but because the prosecution could not prove their theory of the crime.[167] It took a year to remove the Sword of Damocles of that prosecution hanging over her head.[168] And yet, because there was no appeal and no ruling by a higher court, there is no precedent clarifying the statute's application to pregnant people themselves. It is, therefore, entirely possible for other prosecutors and other judges to decide that the pregnant person themselves can be charged for the crime of procuring an abortion procedure.

In a similar case in 2006, a lower court judge dismissed a case against a woman in Suffolk who shot herself in the stomach while pregnant. Finding that the law should not apply to the woman herself.[169] At the time, anti-abortion advocates and prosecutors opined that the law, as written, already applies to the woman herself.[170] However, there were no previous cases and the prosecutors did not appeal the decision.[171] Like the one before it, this case does not have precedential value but does show that from time to time, prosecutors will pursue such cases against pregnant persons.

We have seen in other states even more egregious misuses of prosecutorial discretion, including the prosecution of a woman who was a victim of a shooting, for the death of her fetus in Alabama.[172] While still unusual, these types of cases keep popping up across the country and sadly, more often than not, affect already marginalized communities, women of color, and low-income women.[173] Locating abortion squarely in the criminal code provides a constant temptation for ideologically motivated prosecutors to try to use the Code to attack those whose pregnancy outcomes they find morally objectionable. The fact that the default in Virginia is that abortion is a crime invites the treatment of those who receive and those who perform the procedure as

166 Mark Bowe, *Prosecutors Drop Rare Case Against Chesterfield Woman Accused of Self-Aborting Late Term Fetus, Burying Remains in Backyard*, RICHMOND TIMES-DISPATCH (Oct. 5, 2018), https://richmond.com/news/local/crime/prosecutors-drop-rare-case-against-chesterfield-woman-accused-of-self-aborting-late-term-fetus-burying/article_9581533a-c25c-5e02-933d-e09b669bf725.html.

167 *Id*.

168 *Id*. The "Sword of Damocles" refers to a "looming danger." Evan Andrews, *What Was the Sword of Damocles*, HISTORY (Aug. 22, 2018), https://www.history.com/news/what-was-the-sword-of-damocles.

169 Lillian Ruiz & Lara Setrakian, *Judge Dismisses Charges Against Woman Who Killed Her Unborn Child*, ABC NEWS (Oct. 19, 2006), https://abcnews.go.com/US/LegalCenter/story?id=2585102&page=1.

170 *Id*.

171 *Id*.

172 Sarah Mervosh, *Alabama Woman Who Was Shot While Pregnant Is Charged in Fetus's Death*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/us/pregnant-woman-shot-marshae-jones.html.

173 Varchena, *supra* note 165.

criminals, regardless of whether they have actually broken the law. And in Virginia, as in many other states, the Attorney General's office has no influence on local Commonwealth Attorney offices.[174] Therefore, even with an Attorney General favorably disposed to reproductive rights, local prosecutors can use their positions to target and punish pregnant people. Treating abortion as a crime feeds into the sentiment expressed by President Trump back in 2017 when he said that "there has to be some form of punishment" for the woman receiving an abortion.[175]

States like Illinois and New York have moved to not just remove restrictions on reproductive rights but have also enshrined the right to abortion access directly in the state code.[176] In practice, this means protecting the right of a pregnant person to access an abortion and the right of an abortion provider to deliver the abortion services free from medically unnecessary restrictions that interfere with the patient's right and the provider-patient relationship. California, Connecticut, Delaware, Hawaii, Maine, Maryland, Nevada, Oregon, and Washington are among the states that have passed a statute like the Freedom of Choice Act, which would protect abortion even if *Roe* is overturned and would prevent the regulatory gutting of the right.[177]

Declaring that access to abortion is a right while retaining abortion in the criminal code is contradictory and creates a legal quandary. It is not just that some types of abortions are a crime in Virginia; it is that all abortion is a crime.[178] It is mutually inconsistent to both declare abortion a right and a felony. If there is a right to abortion codified in the law while it remains in the criminal code, courts moving forward will be able to conclude that the legislature intended for the two to be consistent with each other, inviting future legislatures and administrations to create new restrictions and reinstate old ones. After all, this would render the declaration of abortion as a right purely rhetorical and toothless. Decriminalization and codification have to go together: retaining the criminal code would cement the notion that criminalizing a right while protecting it simultaneously is a legitimate path forward, making it impossible to use the codification to stop future potential restrictions. In every state where abortion has been codified as a right, it was

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[174] *See What is the Role of a Prosecutor in Virginia?,* COOK ATTORNEYS (Mar. 6, 2020), https://cookattorneys.com/virginia-prosecutors-and-criminal-charges/ (stating prosecutors have independence regarding what charges to bring).

[175] Jude Ellison Sady Doyle, *When a Miscarriage Becomes a Crime*, ELLE (Apr. 17, 2017), https://www.elle.com/culture/careerpolitics/a44552/when-a-miscarriage-becomes-a-crime/.

[176] Sam Sawyer, S.J., *Explainer: What New York's New Abortion Law Does and Doesn't Do*, AM. MAG. (Jan. 30, 2019), https://www.americamagazine.org/rha2019; Amanda Vinicky, *Illinois House Passes Expansive Abortion Rights Bill*, WTTW (May 28, 2019), https://news.wttw.com/2019/05/28/illinois-house-passes-expansive-abortion-rights-bill.

[177] Sawyer, *supra* note 176.

[178] Except certain specific exemptions as mentioned above.

not simultaneously in the criminal code and did not face the same kinds of restrictions as abortion does and has in Virginia.[179]

B. RHEA Will Not Get Rid of ALL Abortion Restrictions.

With the passage of the Reproductive Health Protection Act, the restrictions on abortion in Virginia have been lessened.[180] However, some medically unnecessary and harmful restrictions remain.[181] The current judicial bypass statute restricts access to abortion for minors. It requires a minor who wants to access abortion without the consent or knowledge of their parent or guardian to acquire a court order. In other states, going through judicial bypass in these situations is not necessary or the decision on whether the juvenile is competent to consent to an abortion without their parents' knowledge or agreement is made by a provider.[182] The RHEA will not change this statute.[183] The requirement for the consent of three physicians, as opposed to two or one for an abortion after the second trimester, places an undue burden in situations where a second or third opinion may not be timely obtained or may be unnecessary or unnecessarily traumatic.[184] When the reasons for an abortion later in pregnancy are patently obvious, forcing the patient to seek additional approvals is not just morally reprehensible and unduly expensive, it is cruel and dangerous, potentially delaying a time-sensitive procedure.[185]

Furthermore, the fact that abortion law is in the criminal code means that medical providers performing abortions must not just follow the current standards of medical practice and the laws and regulations governing all medical providers who practice medicine, but they also must be concerned with potential criminal liability. While other doctors have to worry about civil penalties or loss of license, abortion providers in similar circumstances might face a criminal conviction and even jail time because the rules governing their conduct are in the criminal code, doctors like family physicians already face

[179] *See, e.g.*, Emily Green, *Roe v. Wade is at Risk: What That Means for Oregon*, STREET ROOTS (July 6, 2018), https://www.streetroots.org/news/2018/07/06/roe-v-wade-risk-what-means-oregon (stating that the Reproductive Health Equity Act passed in 2017, which codified the right to legal abortion in Oregon); *What you Need to Know about the Reproductive Health Act*, N.Y. CIVIL LIBERTIES UNION, https://www.nyclu.org/en/campaigns/what-you-need-know-about-reproductive-health-act (last visited Sept. 18, 2021) (noting that the Reproductive Health Act became law in 2019 and that abortion care is no longer regulated in New York's criminal code).

[180] Press Release, *supra* note 14.

[181] *State Facts About Abortion: Virginia*, *supra* note 89.

[182] *See, e.g.*, *Parental Consent and Notification Laws*, PLANNED PARENTHOOD (Aug. 2020), https://www.plannedparenthood.org/learn/teens/stds-birth-control-pregnancy/parental-consent-and-notification-laws (establishing that some states do not require parental consent, whereas others have different requirements for judges to grant a bypass); *Parental Involvement in Minors' Abortions*, GUTTMACHER INST. (Sept. 1, 2021), https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions.

[183] VA. CODE ANN. § 54.1-2969(J) (2021).

[184] *See* VA. CODE ANN. § 18.2-74 (2021) (requiring three physicians to certify the risk to the mother).

[185] *See id.*

barriers to performing abortions, such as potential increased medical malpractice insurance costs.[186] However disproportionate to actual potential liability, placing additional barriers only constrain access to this necessary health care.[187]

Placing abortion rights in the statute does not protect them from a possible reversal of political circumstances. An anti-abortion legislature and executive can change this in the future. Placing abortion protections in the Virginia Constitution would create a more permanent solution. As we've seen with the marriage inequality amendment that is currently stuck in Virginia's Constitution, it is difficult to undo once a change is made. However, even statutory protection has its merits. A change in the executive branch and, therefore, the regulatory arm of the state government can wreak havoc on abortion rights, as we had seen when TRAP laws were first implemented in Virginia back in 2011 and 2012.[188] With the enabling statute for those restrictions repealed and statutory protection appropriately drawn, an administration hostile to abortion rights would have a harder time justifying and implementing restrictions on abortion outside those expressly allowed by statute. Additionally, once abortion is removed from the criminal code and abortion is enshrined as a right, it will become a lot more difficult for anti-abortion prosecutors to attack patients or providers on abortion-related grounds.

C. RHEA Leaves Out Some Aspects of Reproductive Healthcare

RHEA also does not deal extensively with fertility justice.[189] We know that fertility testing and treatment, including IVF and even adoption, can be luxuries unavailable to many.[190] Few insurance plans cover fertility treatment, and the costs associated can be in the tens and hundreds of thousands of dollars, with multiple attempts sometimes necessary to achieve a viable pregnancy.[191] Adoption also has a high price tag, requiring the involvement of adoption agencies, attorneys, doctors, and a highly involved bureaucratic

[186] Christine E. Dehlendorf & Kevin Grumbach, *Medical Liability Insurance as a Barrier to the Provision of Abortion Services in Family Medicine*, 98 AM. JUR. PUB. HEALTH 1770, 1771 (2008).

[187] *Id*. at 1773.

[188] Lori Adelman, *New Trap Laws Force Virginia Abortion Clinic to Close After 40 Years of Service*, FEMINISTING (Apr. 22, 2013), http://feministing.com/2013/04/22/new-trap-laws-force-virginia-abortion-clinic-to-close-after-40-years-of-service/.

[189] H.B. 1922, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) (including assistance for eligible services).

[190] Isabel Galic et al., *Disparities in Access to Fertility Care: Who's In and Who's Out*, 2 FERTILITY & STERILITY REPS. 109, 109 (2021).

[191] *Id*. at 116.

process.[192] This is another way society privileges the reproductive ability of some over others.[193]

Existing fertility inequities are also beyond the scope of this paper, but there are a few important areas of intersection with the RHEA bill. Medicaid does not cover many medical interventions and even testing.[194] When private insurance coverage exists, which isn't often, the coverage often does not extend to transgender individuals.[195] This limits access to fertility treatments.[196] A recent Supreme Court case has made it more difficult for states to ensure that state-supported adoption services serve all potential families equally without regard for gender and sexual orientation.[197] As we consider the future iterations of RHEA, this is another area due for a re-evaluation and possible inclusion.

Compounding the effects of disparities resulting from uneven insurance coverage and access, explicit and implicit bias also affects reproductive healthcare access and outcomes. Recent guidance by the American College of Obstetricians and Gynecologists underscores the often unacknowledged and unmeasured role of racial bias and systemic racial injustice in reproductive health disparities and highlights a renewed commitment to eliminating them.[198] Addressing structural and economic barriers to access to the full range of reproductive healthcare without addressing implicit racial bias in the healthcare profession will be neither complete nor comprehensive. In a country with a history of supporting eugenics programs and forced sterilizations, reproductive health care is perhaps one of the areas in which bias has been most troubling.[199] In the U.S., racist policies are not a thing of the distant past. It was just a little over two decades ago when recipients of state welfare benefits were given cash bonuses for getting Norplant, a 5-year contraceptive

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[192] *See generally Planning for Adoption: Knowing the Costs and Resources*, CHILDREN'S BUREAU (Nov. 2016), https://www.childwelfare.gov/pubpdfs/s_costs.pdf.

[193] Andre M. Perry, *We Should All Be Able to Have Babies Like White People*, THE NATION (Mar. 9, 2021), https://www.thenation.com/article/society/maternity-fertility-black-women/.

[194] Gabriela Weigel et al., *Coverage and Use of Fertility Services in the U.S.*, KAISER FAM. FOUND. (Sept. 15, 2020), https://www.kff.org/womens-health-policy/issue-brief/coverage-and-use-of-fertility-services-in-the-u-s/.

[195] *Id.*

[196] *Id.*

[197] Tucker Higgins, *Supreme Court Sides with Catholic Adoption Agency that Refuses to Work with LGBT Couples*, CNBC (June 17, 2021), https://www.cnbc.com/2021/06/17/supreme-court-sides-with-catholic-adoption-agency-that-refuses-to-work-with-lgbt-couples.html.

[198] *Our Commitment to Changing the Culture of Medicine and Eliminating Racial Disparities in Women's Health Outcomes*, AM. C. OBSTETRICIANS AND GYNECOLOGISTS (2021), https://www.acog.org/about/our-commitment-to-changing-the-culture-of-medicine-and-eliminating-racial-disparities-in-womens-health-outcomes.

[199] Nicole Baltrushes-Hughes et al., *Race and Reproductive Justice: An Argument For Focused Advocacy and Implicit Bias Training in Reproductive Health Curriculum,* TEACH (Sept. 28, 2017), https://www.teachtraining.org/race-and-reproductive-justice/#more-1865.

implant, and one decade ago when inmates in California were coerced into sterilization.[200]

But we need not look to decades or even years. In 2018, a proposed amendment to the Governor's budget regarding the LARC pilot program would have prioritized access to LARCs to women with a substance abuse diagnosis.[201] Thanks to the advocacy of the reproductive rights and justice community and healthcare professionals, the amendment was removed before the budget passed.[202] But the mere introduction shows a continued bias among even well-meaning politicians when it comes to access to reproductive healthcare and contraceptive methods.

More recently, the LARC program was expanded to include all forms of birth control.[203] There is a disparity in the kind of care and advice provided to patients depending on race, even when controlling for income differences in reproductive healthcare.[204] Studies have shown that poor women of color are more likely to be recommended LARCs than their similarly situated white counterparts.[205] Latina women are more likely to be counseled on sterilization than white women, while white women receive more counseling on fertility treatments.[206] Stratified reproduction, in which some women's fertility was valued and that of others was devalued, is a clear example of structural racism and sexism.[207]

One 2020 study on implicit bias in reproductive healthcare and counseling for permanent contraception showed that the unaddressed implicit racial bias leads to poor patient-provider communication and poor patient satisfaction for patients of color.[208] The disparities are even more present when one compares the disparities in contraceptive and fertility counseling for low-income women of color compared to white middle-class women.[209] For women of color, this can lead to pressure to accept contraceptive methods that don't

[200] *Id*.

[201] Budget Amendments – SB30 (Member Request): Item 292 #2s, S. 30, 2018 Sess. (Va. 2018), https://budget.lis.virginia.gov/amendment/2018/1/SB30/Introduced/FA/292/2s/.

[202] *See, e.g*., *Oppose Budget Item 292#1s (Dunnavant)*, VA. PRO-CHOICE COAL. (2019), https://virginia.prochoiceamericaaffiliates.org/wp-content/uploads/sites/12/2019/01/LARC-Budget-Amendment-Fact-Sheet.pdf (illustrating reproductive rights advocacy).

[203] 2020 Appropriation Act, H.B. 30 ch. 1289 (Va. 2020), https://budget.lis.virginia.gov/get/budget/4186/HB30/.

[204] Cosette Kathawa & Kavita Arora, *Implicit Bias in Counseling for Permanent Contraception: Historical Context and Recommendations for Counseling*, 4.1 HEALTH EQUITY 326, 327 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7410277.

[205] Baltrushes-Hughes, *supra* note 199.

[206] *Id*.

[207] Kathawa & Arora, *supra* note 204 at 326.

[208] *Id*.

[209] Baltrushes-Hughes, *supra* note 199.

align with patients' reproductive goals.[210] Bias among even well-intentioned healthcare professionals is real, and while not the primary driver of health disparities, it certainly contributes.[211] While working on access, addressing implicit and explicit bias in care delivery is another important piece of the overall effort to ensure that everyone can access the patient-centered and patient-driven care they need.

CONCLUSION

While RHEA will not solve every access problem in Virginia, it is the critical next step on the road to becoming a state where everyone can access the care they need irrespective of race, class, immigration status, gender, or sexuality. Improved access to comprehensive reproductive healthcare, including abortion care, enhances the health and long-term well-being of the patient, and their children, families, and society at large. This is a big, expansive bill that will require a multi-year strategy for passage in the General Assembly, so it can remain inclusive of the non-negotiable positions outlined above.

Continuing to have a patchy and stratified system that leaves individuals and families in marginalized communities unable to control their reproductive destinies and ensure their health and the health of their children is unconscionable for a country as wealthy as the United States and for a state as wealthy as this Commonwealth. That being said, we also know that opposition to comprehensive policy solutions is often short-sighted and ignores the practical policy reasons for each portion of the bill. Much of it is also based on misconceptions and a lack of appreciation for the benefits both to individuals and to society of comprehensive universal reproductive healthcare access. RHEA is the north star for reproductive access in Virginia. If passed, it will have a huge positive impact on the ability of marginalized communities to access reproductive healthcare. It is both a moral imperative and a smart policy decision to pass this comprehensive piece of legislation.

[210] *Id*.

[211] *Id*. (discussing the bias and negative outcomes women of color face).