
Webinar
July 7, 2022
Zoom Q&A

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Moderator and Presenters

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Today’s Discussion:

(1) The *Dobbs* decision and legal impacts

(2) Alternate litigation emerging nationally to protect reproductive health access

(3) Current legislative and executive approaches, with primary focus on approaches designed to promote reproductive health and access
Roe v. Wade and Planned Parenthood v. Casey

Roe v. Wade (1973)
Written by Justice Blackmun, Roe guaranteed the individual right to abortion, preventing states from fully banning pre-viability abortions (currently, roughly 24 weeks’ gestation).

Planned Parenthood v. Casey (1992)
Written by Justices O’Connor, Kennedy, and Souter, Casey clarified that states can regulate pre-viability abortions, but cannot impose an undue burden on the right to abortion (e.g., requiring spousal consent).
Dobbs v. Jackson Women's Health Organization

Mississippi enacts law banning abortion after 15 weeks except in narrow cases of medical emergency or “severe fetal abnormality.”

2018

After district court and 5th Circuit find Mississippi law unconstitutional (per Roe v. Wade), U.S. Supreme Court agrees to hear the case

2021

On June 24, 2022, the Court issued its decision, fully overturning Roe v. Wade and Planned Parenthood v. Casey

2022
The *Dobbs* Decision: Reasoning

- Constitutional Text & Nation’s History
- Rejecting Stare Decisis
- Setting a New Standard
The *Dobbs* Court concluded that abortion is not mentioned in the Constitution’s text nor is it deeply rooted in the nation’s history and traditions – e.g., it is *not* a fundamental right.
The Dobbs Decision: Scope

Mississippi initially challenged the viability line, but the Court’s eventual opinion in Dobbs goes well beyond this line, reasoning that the Constitution does not protect any right to abortion.

The Answer = There is no constitutional right to abortion.

The Question = Viability.

“Whether all pre-viability prohibitions on elective abortions are unconstitutional.”
The *Dobbs* Decision: Dismissing *Roe*

*Dobbs* Court finds abortions are traditionally “unplanned,” not implicating traditional reliance.

*Dobbs* Court finds abortion case impacts on other issues, including third-party standing.

*Dobbs* Court argues *Roe* wrongly removed abortion from democratic processes.

*Dobbs* Court calls *Roe* “egregiously wrong,” more legislative than judicial.

*Dobbs* Court finds *Casey’s* standard too malleable.

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**Nature of the Error**

**Quality of the Reasoning**

**Workability of the Rules**

**Disruptive Effect on Other Areas of Law**

**Absence of Concrete Reliance**

**Rejecting Stare Decisis**
The *Dobbs* Decision: A New Standard

Abortion is not a fundamental right under the Constitution, requiring only **rational basis review** in future challenges:

Law must be *rationally related to a legitimate government interest*.

*Dobbs* further announced that “**legitimate interests include**

- respect for and preservation of prenatal life at all stages of development, . . . ;
- the protection of maternal health and safety;
- the elimination of particularly gruesome or barbaric medical procedures;
- the preservation of the integrity of the medical profession;
- the mitigation of fetal pain; and
- the prevention of discrimination on the basis of race, sex, or disability.”
The Court concluded that abortion is not mentioned in the Constitution’s text nor is it deeply rooted in the nation’s history and traditions – e.g., it is not a fundamental right.
The *Dobbs* Decision: Potential Impacts

**Majority:**
“[W]e emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”

**Justice Thomas Concurrence:**
“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."

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**PRIVACY**

- [Image: Circle diagram showing relationships between privacy, marriage equality, contraception, and sexual intimacy.]
Justice Kavanaugh’s Concurrence:

“[M]ay a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before today’s decision takes effect? In my view, the answer is no based on the Due Process Clause or the Ex Post Facto Clause.”
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State-level Bans Reinstated

- Mississippi
- Alabama
- South Carolina
- Tennessee
- Texas
- Florida
- Ohio
Federal Court Challenges: South Carolina & Tennessee

On June 27, a federal district court ruled that a law restricting abortions in South Carolina after six weeks of pregnancy can take effect immediately in the state.

On June 28, the U.S. Court of Appeals for the Sixth Circuit lifted an injunction on Tennessee’s 2020 abortion ban, allowing it to go into effect.
State Constitutional Challenges

Kentucky

Louisiana

Florida (failed?)

Ohio (failed)

Texas (failed)

“Failed” = state courts, post-*Dobbs*, did not recognize abortion rights as included in the state constitution.

Idaho

Mississippi (failed)

Utah
State Constitution-Based Challenges: Florida

On July 5, Florida’s abortion ban was reinstated after initial success when a state judge granted a restraining order on June 30, holding that the Florida law violates privacy protections in the state constitution.

Florida argues 15-week abortion case belongs on fast track to state Supreme Court

BY JIM SAUNDERS NEWS SERVICE OF FLORIDA
UPDATED JULY 06, 2022 3:15 PM

Florida’s 15-week abortion ban reinstated

The state appealed a decision by a state judge, allowing the abortion ban.

By Nadine El-bawab and Ely Brown
July 05, 2022, 2:58 PM
State Constitution-Based Challenges: Mississippi

On July 5, a judge denied a request from Mississippi’s only abortion clinic to temporarily block the state’s trigger law banning most abortions, holding that the plaintiffs did not show they were likely to win on a claim that the Mississippi Constitution protects a right to terminate a pregnancy.

LEGAL

Judge won’t block law banning most Mississippi abortions

The Mississippi law was at the center of last month’s landmark Supreme Court ruling.

POLITICO
State Constitution-Based Protections

STATE-BASED ABORTION PROTECTIONS
JUNE 29, 2022

In light of the overturning of Roe v. Wade by the U.S. Supreme Court in Dobbs v. Jackson Women’s Health Organization on June 24, 2022, this Memo examines current state-based abortion protections via (1) state statutory and constitutional language, (2) state Supreme Court decisions, (3) state constitutional amendment proposals, and (4) litigation addressing state-based constitutional abortion rights.

Source: https://www.networkforphl.org/resources/state-based-abortion-protections/
State Constitution-Based Protections

Alaska
California
Florida
Illinois
Kansas
Massachusetts
Minnesota
Montana
New Jersey
Governor Gretchen Whitmer filed a lawsuit in April 2022 to invalidate a 1931 state law that makes abortions a felony. The law has been temporarily blocked pending litigation.

Whitmer’s lawsuit asks the state supreme court to recognize a constitutional right to an abortion under the Due Process Clause of the Michigan Constitution.

Whitmer Files Motion in Michigan Supreme Court to Protect Constitutional Right to Abortion

June 24, 2022
Multiple “Tiers” of Laws: Iowa

Iowa governor asks court to reinstate six-week abortion ban

Iowa Supreme Court overturns 2018 ruling, says abortion isn't protected by the state constitution
Evolving Legal Landscape: Wisconsin

In Wisconsin, Attorney General Josh Kaul filed a lawsuit challenging an abortion ban from 1849, arguing that modern generations never consented to it.

The law conflicts with later Wisconsin laws.

Attorney General Josh Kaul sues to block Wisconsin's abortion ban

The lawsuit argues that a 1985 law that allows abortions up to the point of a fetus' viability supersedes the 1849 ban

By Madeline Fox
Published: Tuesday, June 28, 2022, 1:55pm
Updated: Tuesday, June 28, 2022, 4:00pm
Vague or Unclear Laws: Louisiana

An abortion trigger law was blocked on June 27 (at least until a hearing on July 8). Abortion providers sued arguing the bans were unlawfully vague.

The lawsuit alleges that the law is unclear on when the ban takes effect and unclear on medical exceptions.

Following a 2020 ballot measure, the state constitution cannot be “construed to secure or protect a right to abortion or require the funding of abortion.”
GenBioPro

GenBioPro, a manufacturer of generic abortion pills, sued the state of Mississippi in 2020 over state restrictions limiting access to the drugs in the state.

The lawsuit alleges that state restrictions are unduly excessive and are preempted by FDA authority.

Abortion drug maker says Mississippi can't ban pill despite Supreme Court ruling

By Brendan Pierson

July 1, 2022
1:02 PM CDT

REUTERS
Religious Freedoms Arguments: Florida

A synagogue in Florida, Congregation L’Dor Va-Dor, argues that the state law banning abortions violates First Amendment rights.

Synagogue Sues Florida, Saying Abortion Restrictions Violate Religious Freedoms

A South Florida congregation said that under Jewish law, abortion “is required if necessary to protect the health, mental or physical well-being” of a pregnant woman.

The New York Times

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Interactive Map: US Abortion Policies and Access After Roe

The abortion landscape is fragmented and increasingly polarized. Many states have abortion restrictions or bans in place that make it difficult, if not impossible, for people to get care. Other states have taken steps to protect abortion rights and access. To help people understand this complex landscape, our interactive map groups states into one of seven categories based on abortion policies they currently have in effect. Users can select any state to see details about abortion policies in place, characteristics of state residents and key abortion statistics, including driving distance to the nearest abortion clinic.

The map reflects state policies in effect as of July 5, 2022.

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State Actions: Anti-Abortion
Current Ban Enforcement

At least 8 states are currently enforcing (or currently able to enforce) complete abortion bans:

- Alabama, Arkansas, Missouri, Oklahoma, South Dakota, Texas, Wisconsin, West Virginia

In these states, punishments include:

- Terms of imprisonment ranging from 2 years to 99 years; and
- Fines ranging from $1,000 to $100,000.

Several additional states have passed trigger laws set to become effective at least 30 days after Roe’s overturning. Additional states bans may currently be blocked through court challenge (KY, LA, UT).
Legislative Actions: Pro-Abortion
New York: Post-Draft Legislation

- Prohibiting licensure misconduct for providing abortions to out-of-state patients
- Prohibition of adverse actions by malpractice insurance carriers for reproductive health services
- Establishing a cause of action “for those who unlawfully interfere with the rights to reproductive healthcare”
- Extends address confidentiality to reproductive health providers
- Blocking NYS participation in out-of-state abortion cases, both civil and criminal (e.g., no extradition, no honoring of out-of-state subpoenas)
Maryland:
State law, passed over Governor’s veto, expands abortion provider categories;
Establishes Abortion Care Clinical Training Program ($3.5 million annually)
Requires private insurers to cover abortion AND requires matching Medicaid coverage (e.g., without cost sharing)

Oregon:
Among other provisions, law signed in March empowers OHA to fund repro health services and education
Law signed in April allocates $15 million to the Oregon Health Authority for reproductive health equity
Connecticut: Post-Draft Legislation

Law signed in May 2022:

- Provides damages and attorneys’ fees to persons sued in any state for providing repro health services legal in CT (including costs incurred both in the other state and in CT)
- Prevents prosecution or assistance in proceedings related to out-of-state persons receiving repro health services in CT
- Expands medication abortion provider categories to include APRNs, nurse-midwives, and physician assistants
Executive Actions: Pro-Abortion
Gov. Charlie Baker issued **Executive Order No. 600** on June 24, 2022:

- Massachusetts executive agencies prevented from assisting out-of-state abortion investigations/proceedings;
- Licensure boards to work with executive agencies to protect licensees from discipline based on actions taken in other states for providing repro health services
- Refusal to extradite persons to other states for repro health-related crimes
Minnesota

Gov. Tim Walz issued Emergency Executive Order 22-6 on June 25, 2022:

• State agencies must coordinate to protect the provision of repro health care services in the state; Departments to provide a report on services on August 1, 2022

• No state agencies will assist other state investigations or proceedings related to provision of legal repro services

• Refusal to extradite persons charged with repro health-related crimes
New Mexico

Gov. Michelle Lujan Grisham issued Executive Order 2022-107 on June 27, 2022:

- Preventing state agency assistance with investigations or proceedings of other states related to provision of legal repro health services
- Ensure against discipline from New Mexico licensing boards related to other state discipline for repro health services
- Refusal to extradite persons charged with repro health-related crimes
Governors of Washington, Oregon, and California signed a multi-state agreement on June 24, 2022:

- Protect against other state efforts targeting patients, professionals, and others;
- Protect against cooperation with out-of-state investigations, inquiries, and arrests;
- Refuse extradition for criminal prosecution, and prevent subpoenas or summons issuing in these cases;
- Protect against medical record misuse;
- Protect against adverse liability insurance actions;
- Support legislation to protect licensed professionals from adverse licensing determinations;
- Expand access to abortion services; and
- Defend against misinformation.
State Constitutional Efforts

- Efforts are being undertaken in at least 7 states to explicitly amend state constitutions with language protecting reproductive liberties.
- Vermont is the only state so far to place a reproductive liberty-based constitutional amendment on the November 2022 ballot.
- Efforts are also underway in several states to eliminate abortion from state constitutional protection.

9 state supreme courts have found abortion rights in state constitutional language.
Questions, Thoughts, Comments

Thank you!

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