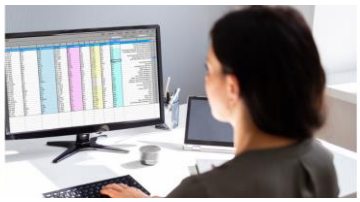
The Network for Public Health Law

Ideas. Experience. Practical answers.






ABORTION ACCESS: POST-*DOBBS* LITIGATION THEMES

SEPTEMBER 9, 2022

On June 24, 2022, the U.S. Supreme Court ruled in *Dobbs v. Jackson Women's Health Organization* that there is no federal constitutional right to abortion, reversing its prior decisions in *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992).

Following the Court's decision in *Dobbs*, some states have sought to provide greater or enhanced protections for abortion access. Other states, however, have initiated a series of measures to greatly limit or inhibit abortions. These actions include (a) implementation of pre-existing "trigger" laws banning procedures the moment abortion was no longer a federal constitutional right; (b) enforcement of decades-old laws banning abortion that were never repealed (following the Supreme Court's initial decision affirming a right to abortion in *Roe*); and (c) passage of new statutes restricting abortions.

A flood of litigation has ensued regarding state anti-abortion legislation. Reproductive rights advocates, abortion care providers, and other stakeholders have filed lawsuits attempting to preserve abortion access or at least delay outright bans. In the absence of a federal constitutional right to an abortion, they argue that laws restricting or banning abortion violate state constitutional provisions, are unconstitutionally vague, or conflict with other federal or state laws.

This Memo provides an illustrative discussion of key emerging themes from litigation challenging state-based anti-abortions laws or policies. The memo does not attempt to present an exhaustive review of all such cases across the U.S., but rather a select assessment of core legal arguments arising from judicial challenges nationally organized under 4 major themes: (1) state constitutional challenges; (2) vagueness; (3) implied repeal; and (4) preemption. This Memo will be updated on a monthly basis.

The Network for Public Health Law has developed a series of reproductive health resources in the aftermath of the *Dobbs* decision. To access all of the Network for Public Health Law resources on reproductive health and equity, visit this link. To learn more about ballot measures on abortion access, visit this link. To learn more about state-based abortion protections, visit this link. To learn about abortion access as a post-*Roe* public health emergency, visit this link.

I. State Constitutional Challenges

Some of the earliest lawsuits challenging state abortion restrictions post-*Dobbs* relied on state constitutional arguments. State constitutions may offer strong protections for abortion rights. For example, while the federal Constitution does not expressly include language protecting a right of privacy, California's State Constitution does. California's and other states' supreme courts have previously interpreted state constitutional privacy guarantees to exceed federal constitutional protections and to protect rights to receive abortion care.

In **Florida**, Planned Parenthood of Southwest and Central Florida (and other reproductive rights organizations) filed a lawsuit on June 1, 2022 challenging the state's 15-week abortion ban (HB 5) as violating privacy rights guaranteed in Florida's Constitution. The state constitution was amended in 1980 to "guarantee Floridians a broad right of privacy," conferring explicit language protecting privacy. In 1989, the state supreme court held in *In re T.W.* that the privacy amendment protected a "woman's decision…whether to end her pregnancy." The court clarified that because the constitutional amendment conferring privacy rights was adopted after *Roe*, "the public was aware that the right to an abortion was included under the federal constitutional right of privacy and would therefore certainly be covered by the Florida privacy amendment." On June 30, 2022, a state judge initially ruled in favor of Planned Parenthood, halting enforcement. On subsequent appeal by the state attorney general, HB 5 was procedurally reinstated hours later (under Florida law, the state attorney general's notice of appeal automatically stayed the injunction). Although advocates pushed for immediate review by the Florida supreme court, a state appeals court declined to fast-track the case, leaving the abortion ban in effect. On July 31, 2022, three Jewish rabbis filed a lawsuit seeking to invalidate HB 5. They argue that, in addition to violating state statutory protections, HB 5 violates rights to free speech and free exercise of religion under the Florida state constitution.

Judicial challenges to state abortion laws leverage multiple constitutional provisions in addition to privacy-based protections. **Ohio**'s restrictive law banning most abortions was challenged on June 29, 2022 as violating the state constitution's due process and equal protection clauses, the bill of rights, and a 2011 constitutional amendment stating that Ohioans are free to choose their own health care. However, on July 1, 2022, the state supreme court summarily rejected requests by abortion providers to block the state's six-week abortion ban pending further litigation.

On June 25, 2022, Planned Parenthood Association of Utah raised state constitutional arguments against **Utah**'s trigger law, SB 174, which bans abortions with few exceptions and imposes criminal penalties. Planned Parenthood alleged that SB 174 violates state constitutional provisions supporting: (1) rights to determine family composition and to parent; (2) equal protection; (3) rights to uniform operation of laws; (4) substantive due process rights to bodily integrity; (5) prohibitions on involuntary servitude; (6) rights of conscience; and (7) rights to privacy. The State of Utah argued conversely that the state constitution recognizes rights for unborn children. A state judge halted enforcement of SB 174 on July 11, 2022 pending appeals, finding Planned Parenthood successfully showed that women seeking abortions may be harmed. Utah's trigger law is currently on hold.

A complaint filed in a **Georgia** state court on July 23, 2022 by SisterSong Women of Color alleges that the state's anti-abortion law (HB 481) violates the Georgia Constitution's rights to privacy, liberty, and equal protection. The 2019 law banning most abortions after six weeks was ruled unconstitutional shortly after its enactment. On July 20, 2022, the Eleventh Circuit Court of Appeals allowed the law to immediately take effect after the Supreme Court's decision in *Dobbs*. SisterSong's complaint alleges that (1) the Georgia Constitution prohibits unwarranted state interference with liberty interests in life, body, and health that arguably include the right to abortion; and (2) the law violates Georgians' privacy rights by allowing district attorneys broad access to medical files.

Similarly, reproductive rights advocates challenged **Wyoming**'s trigger law, HB 92, on August 1, 2022, arguing that the law violates the state constitution's right for Wyomingites to "make his or her own health care decisions." On August 10, a state district judge issued an injunction, pausing the law's enforcement while litigation is pending. The judge was persuaded by the plaintiffs' constitutional argument, writing that "[t]he analysis lends itself to a finding that a decision to have an abortion is a health care decision" under the Wyoming constitution. A lawsuit filed by reproductive rights clinics on August 30 challenging **Indiana**'s abortion ban alleged that the ban "strips away the fundamental rights of people seeking abortion care" in violation of the state constitution. It is currently unclear whether the Indiana constitution protects abortion rights. A 2004 state appeals court decision

(*Clinic for Women, Inc. v. Brizzi*) held that privacy was a core value under the state constitution, but in 2005 the Indiana Supreme Court upheld (*Clinic for Women, Inc. v. Brizzi*) a state law mandating an 18-hour waiting period before abortion services could be rendered without deciding whether the state constitution included rights to privacy. Litigation is ongoing.

Even when state courts have seemingly protected abortion access under state constitutions, prior judicial determinations are not set in stone (as demonstrated in *Dobbs*). In **Mississippi**, Jackson Women's Health Organization (the same abortion clinic which litigated *Dobbs*) sued various state health officers on June 27, 2022, to prevent the state's trigger law banning most abortions from taking effect. The clinic cited a 1998 Mississippi Supreme Court ruling (*Pro-Choice Mississippi v. Fordice*) finding the state constitutional right to privacy "includes an implied right to choose whether or not to have an abortion." The state attorney general's office argued the 1998 holding was grounded in U.S. Supreme Court decisions overturned by *Dobbs*. On July 5, a judge declined to temporarily block the trigger law, determining the clinic failed to show that Mississippi's constitution protects abortion rights. On July 19, 2022, Jackson Women's Health Center dismissed its lawsuit after the clinic owner sold the facility. An attorney for Jackson Women's Health Organization explained that "[i]f the clinic is not in a position to reopen in Mississippi, it no longer has a basis to pursue this case in the courts." Mississippi's trigger ban remains in effect.

Oklahoma's state constitution allows legal challenges that "threaten grave constitutional crises" to begin at the state supreme court. On July 1, 2022, advocates challenging the state's abortion ban went directly to the Oklahoma Supreme Court, where litigation is currently pending. Plaintiffs argue that the state's abortion restrictions violate the state constitution's substantive due process requirements and rights to personal autonomy and bodily integrity.

II. Vagueness

Reproductive rights advocates have challenged state abortion laws as being unenforceable or void due to vagueness. Arguments grounded in "vagueness" suggest that substantive due process principles derived from the U.S. Constitution's Fourteenth Amendment, and replicated in select state constitutions, disallow enforcement of laws that are arbitrary, capricious, or so "vague" as to obfuscate their enforcement or fail to give fair notice of prohibited actions.

Because **Louisiana**'s constitution (like many states) does not explicitly protect abortion, abortion providers sued on June 27, 2022 to block the state's trigger law banning abortions (L.R.S. § 40:1061) on vagueness grounds. They argued the statute was obscure particularly as applied in cases involving fetal abnormalities as the law does not seemingly allow any exceptions, arguably leaving unclear what conduct is prohibited or what penalties should be imposed. On July 21, a Louisiana judge blocked the law, allowing state clinics to operate while the challenge goes to trial. Eight days later on July 29, a state appeals court allowed the state attorney general to enforce the ban pending litigation. The Louisiana supreme court denied an emergency motion to block enforcement on August 12, leaving the ban on most abortions in the state in effect.

In **Arizona**, a federal judge blocked a state statutory interpretation provision attempting to extend statutory rights to fetuses on July 11, 2022. Plaintiffs successfully argued that the law's language was unconstitutionally vague because it provided no meaningful guidance or clarity on the scope of the law.

States may seek extra-judicial avenues to resolve vague abortion laws. After a **North Dakota** judge placed the state's trigger law on hold (on July 27, 2022) when the attorney general incorrectly determined the law's effective date, state lawmakers called for an attorney general's opinion on August 1 to clarify inconsistencies related to emergency care underlying the state's abortion restrictions. On August 26, a state judge blocked the law after finding that the harm it would cause to individuals outweighed any harm to the state.

III. Implied Repeal

Some states feature multiple laws regulating abortions, leading reproductive rights and other advocates to challenge their enforceability on grounds that older state laws restricting abortion have been impliedly repealed by subsequent conflicting laws. Essentially, the legal argument postulates that inconsistent laws cannot be enforced simultaneously, and that to give effect to the intent of the legislature, an older law which conflicts with a more recent one is said to have been repealed not expressly, but by implication.

In **West Virginia**, the American Civil Liberties Union (ACLU) argued that the state's 1883 abortion ban conflicts with newer statutes and thus should be void as repealed by implication. On July 18, 2022, a state judge halted enforcement of the law pending further litigation. The state attorney general has asked state legislators to clarify or reconcile conflicting statutes regulating or criminalizing abortions. Similarly, in **Wisconsin**, the state attorney general sued to challenge an 1849 law prohibiting all abortions, except to save the mother's life, arguing that this law conflicts with newer post-*Roe* regulations from the 1980s which only ban the procedure after fetal viability. Wisconsin's attorney general asked the court to invalidate the 1849 provision.

Idaho's 2020 trigger law (I.C. § 18-622(2)) allows abortion providers to be criminally charged, but not patients, which directly conflicts with a 1973 statute making it a felony for anyone to undergo an abortion. Advocates challenging the trigger law argued on June 27, 2022 that the scope of enforceability is unclear.

Arizona's Attorney General asked a state court judge on July 13, 2022 to allow a pre-statehood law banning all abortions to go into effect, even though the state legislature passed a law earlier in 2022 which allows doctors to perform abortions at up to 15 weeks. In a hearing on August 19, 2022, Planned Parenthood argued that the judge should not allow the pre-statehood law to supersede Arizona's other abortion laws. Instead, Planned Parenthood argued the court should harmonize Arizona's abortion laws by allowing the territorial ban to be enforced only against non-doctors, while still allowing doctors to perform abortions as permitted by Arizona's other abortion statutes and regulations.

IV. Preemption

By constitutional design, federal laws are supreme over state laws and are said to overrule, or "preempt," conflicting state laws. Consequently, select states' attempts to limit abortion access have faced challenges that state regulations are contrary to federal law, and thus preempted. On August 2, 2022, the federal Department of Justice sued **Idaho**, alleging the state's near-total abortion ban violated the federal Emergency Medical Treatment and Active Labor Act (EMTALA). EMTALA requires hospitals operating emergency rooms and receiving Medicare funding to screen and provide stabilizing medical care to all patients presenting with an emergency condition and seeking treatment, which could include conditions requiring abortion services (e.g., ectopic pregnancy, severe fetal abnormalities). On August 24, a federal judge blocked Idaho's law while litigation is ongoing, finding it preempted by EMTALA. In the order, the judge noted that Idaho's statute did not make exceptions for serious impairment and dysfunctions threatening patient health, making it impossible for physicians to comply with broad federal EMTALA requirements to provide stabilizing care.

Yet a divergent outcome was almost simultaneously reached in **Texas** when its state attorney general sued the federal Department of Health and Human Services (HHS) on July 14, challenging recent HHS guidance acknowledging that EMTALA can, in some circumstances, require abortion care. On August 23, 2022, a federal judge granted the attorney general's request to preliminarily block HHS's EMTALA guidance in Texas. The court found that HHS likely exceeded its statutory authority by issuing the guidance and also failed to observe required notice-and-comment procedures pursuant to the Medicare Act.

An additional preemption challenge relates to the authority of the U.S. Food and Drug Administration (FDA), which is responsible nationally for food and drug safety pursuant to the Federal Food, Drug, and Cosmetic Act. FDA has issued requirements for the administration of mifepristone (a.k.a., "abortion pill") often used with another drug, misoprostol, to medically induce a miscarriage. FDA requirements for mifepristone authorize the drug to be ingested safely by patients, with a prescription and under a physician's supervision, with sufficient warnings of adverse reactions. A manufacturer of generic mifepristone, GenBioPro, sued the State of **Mississippi** in 2020, arguing that the state's strict mifepristone requirements (e.g., including a requirement that a licensed physician prescribe the drug and witness its ingestion in person) were preempted by FDA's more permissive guidance. On August 18, 2022, GenBioPro voluntarily dismissed the lawsuit, citing a need to adjust their strategy based on the "changed national landscape" caused by the *Dobbs* decision. Still, GenBioPro could refile the suit in the future, or another entity could file a similar challenge. A favorable decision upholding FDA's regulatory authorities could clarify that federal guidelines override contradictory state regulations and validate FDA's authority in setting national policy.

This document was developed by, **Erica N. White, J.D.**, Staff Attorney, and **Lauren Krumholz**, Legal Researcher, and reviewed by **Jennifer L. Piatt, J.D.**, Deputy Director, and **James G. Hodge, Jr., J.D. LL.M**., Director, Network for Public Health Law – Western Region Office, Sandra Day O'Connor College of Law, Arizona State University.

SUPPORTERS

Robert Wood Johnson Foundation

Support for the Network provided by the Robert Wood Johnson Foundation. The views expressed in this document do not necessarily reflect the views of the Foundation.