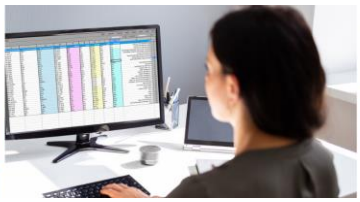
The Network for Public Health Law

Ideas. Experience. Practical answers.






ABORTION ACCESS: POST-*DOBBS* LITIGATION THEMES

NOVEMBER 4, 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no longer a federal constitutional right; (b) enforcement of decades-old "zombie" laws banning abortion that were never repealed (following the Supreme Court's initial decision affirming a right to abortion in *Roe*); and (c) the passage of new statutes restricting abortions.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-abortion 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 5 major themes: (1) state constitutional challenges; (2) religious freedoms; (3) vagueness; (4) implied repeal; and (5) preemption. This Memo will be updated on a monthly basis.

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 explicitly "guarantee Floridians a broad right of 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 of the abortion ban. Yet, 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 August 10, Planned Parenthood sought review by the Florida Supreme Court. Litigation is ongoing.

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. Plaintiff abortion providers argued that Ohio's constitution offered "broad protections for individual liberties" including the right to abortion. 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 September 14, however, a trial court judge temporarily blocked enforcement of the ban, which was then extended for an additional 14 days on September 17, and then suspended indefinitely on October 7 while the case proceeds. The state judge wrote in his opinion that "Ohio's constitution specifically and unambiguously recognized as fundamental the right to liberty" and that it guaranteed the right to "seek and obtain safety."

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, pending appeals, finding Planned Parenthood successfully showed that women seeking abortions may be harmed. On August 11, the Utah Attorney General's Office petitioned the state supreme court to appeal the injunction, and on October 3, the Utah Supreme Court upheld the lower court's decision to halt enforcement of the trigger law, declining to halt the injunction pending appeals.

A complaint filed in a **Georgia** state court on July 23, 2022 by SisterSong Women of Color alleges that the state's 2019 anti-abortion law (HB 481) violates the Georgia Constitution's rights to privacy, liberty, and equal protection. The law, which bans most abortions after six weeks, was ruled unconstitutional shortly after its enactment. On July 20, 2022, the Eleventh Circuit Court of Appeals reinstated the law after the U.S. 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. The two-day trial over Georgia's six-week ban was held on October 24 and 25, but the judge does not expect to issue a ruling until after the state election on November 8.

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.

On August 17, 2022, the **South Carolina** supreme court temporarily blocked enforcement of the state's 6-week abortion ban (S1), pending a determination of the law's constitutionality. The court indicated that the law may conflict with state constitutional privacy protections. Two months later, on October 19, oral arguments were presented to the court. A decision on the law's constitutionality is pending.

A lawsuit filed by reproductive rights clinics on August 30, 2022, challenges **Indiana**'s abortion ban (SB 1), alleging that the ban "strips away the fundamental rights of people seeking abortion care" in violation of the state constitution. Yet 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 the law in question, which mandated an 18-hour waiting period before abortion services could be rendered, without deciding whether the state constitution included rights to privacy. On September 22, 2022, a state judge granted the clinics' request to preliminarily preclude enforcement of SB 1, finding that "there is a reasonable likelihood that decisions about family planning, including decisions about whether to carry a pregnancy to term" are protected by the Indiana constitution. On October 12, the Indiana supreme court upheld the lower court's decision to block enforcement of the ban, pending litigation. The state supreme court also agreed to hear the case, scheduling oral arguments for January 12, 2023. Currently, abortions remain legal in Indiana.

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*, which held 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 countered that *Fordice* was grounded in U.S. Supreme Court decisions overturned by *Dobbs*. On July 5, 2022, 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, 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 bans (OK Stat § 21-861 and SB 612) 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. Religious Freedoms

Emerging arguments against state abortion restrictions allege bans violate religious freedoms including constitutional protections and state Religious Freedom Restoration Acts (RFRA). The federal constitution and many state constitutions protect the free exercise of religion and prohibit the establishment of a state religion. Likewise, state RFRAs protect against laws that burden religious exercise absent compelling governmental interests.

In **Indiana**, The Satanic Temple (TST) filed suit on September 21, 2022, asserting that the state's abortion ban interferes with Indiana followers' religious rights under Indiana's RFRA. Specifically, TST members adhere to 7 tenets, including that "[o]ne's body is inviolable, subject to one's own will alone," and that "[b]eliefs should conform to one's best scientific understanding of the world." Indiana's abortion ban precludes involuntarily

pregnant women from obtaining abortions that are medically safe and supported. On September 30, TST filed a similar lawsuit in **Idaho**. The Idaho supreme court held oral argument on October 6.

Courts may independently raise constitutional objections. A **Kentucky** state judge blocked the state's trigger law banning all abortions (with an exception for when the mother's life is in danger) and an additional fetal heartbeat law from going into effect on July 22, 2022, ruling that the laws violate establishment and free exercise clauses of the state constitution. The judge held that by indicating that life begins at conception, the state abortion bans "impermissibly establish[] a distinctly Christian doctrine of the beginning of life, and [] unduly interfere[e] with the free exercise of other religions that do not share that same belief." However, the religious argument was not ultimately successful as both Kentucky's trigger law and more recent abortion ban went into effect on August 2 when a state appeals court lifted temporary injunctions.

Yet, on October 6, three Jewish women filed a lawsuit in **Kentucky** state court again attempting to block the ban, arguing that the law violated religious rights under the Kentucky constitution. According to the complaint, Jewish law has defined human life as beginning at birth, not conception, as the Kentucky law implies, arguing that it thus imposes "sectarian theology on Jews," violating section 5 of the state constitution by giving preference to Christianity and diminishing privileges, rights, and capacities on account of Jewish faith. Moreover, the lawsuit states that the law violates religious rights as applied to in vitro fertilization. Kentucky's total abortion ban may lead to potential criminal liability under the state's fetal homicide law for failure to upkeep frozen embryos. The complaint further alleges violations under Kentucky's RFRA. Similarly, on September 8, Hoosier Jews for Choice filed suit in **Indiana** state court, alleging violations of their "sincere religious beliefs that [may] direct them to obtain an abortion" as well as those "who are at risk of needing an abortion in the future consistent with these beliefs."

Similar lawsuits were filed in **Florida**. On June 10, 2022, the synagogue Congregation L'Dor Va Dor of Boynton Beach, Florida alleged that Florida's law prohibiting abortions after 15 weeks violates Jewish teachings and "prohibits Jewish women from practicing their faith free of government intrusions," violating "privacy rights and religious freedom" under the Florida state constitution. On August 1, five separate lawsuits were filed by various religious leaders challenging Florida's HB 5, asserting free speech and religious exercise violations under the Florida constitution. The lawsuits were filed by three Jewish rabbis, a reverend of the United Church of Christ, a minister of the Unitarian Universalist Congregation, a priest of the Episcopal Church, and a lama of Buddhism.

III. 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.

On July 11, 2022, an **Arizona** federal judge blocked a state statutory interpretation provision attempting to extend statutory rights to fetuses. 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. On July 27, 2022, a **North Dakota** judge placed the state's trigger law on hold when the attorney general incorrectly determined the law's effective date. State lawmakers then 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. On September 23, the same judge reaffirmed the block on the law's enforcement, pending a decision on the law's constitutionality. On October 11, the North Dakota supreme court ordered the lower court judge to reconsider his decision to block enforcement of the abortion restrictions, and several weeks later on October 31, the lower court judge reaffirmed the block on the law's enforcement based on a "substantial probability" that constitutional challenges will succeed based on the constraint placed on doctors. Abortion currently remains legal in North Dakota.

Idaho's 2020 trigger law (I.C. § 18-622(2)) allows abortion providers to be criminally charged, but not patients. Advocates challenging the trigger law argued on June 27, 2022, that the law not only violates rights to privacy and equal protection under the Idaho Constitution, but also due process rights because the scope of its enforceability is unclear. Abortion advocates had also challenged Idaho's "heartbeat law" and 6-week abortion ban. On August 12, the Idaho Supreme Court consolidated the three cases and permitted the trigger law (which superseded the 6-week ban) and heartbeat law to take effect, pending a determination of the laws' constitutionality. The Idaho supreme court held oral arguments regarding the laws' constitutionality on October 6.

On October 21, the first day of a trial determining the constitutionality of **Georgia**'s restrictive abortion law (discussed above), an OB/GYN professor serving as expert witness testified that the law's definition of "medical emergency" was "vague" and made it difficult for physicians to determine which procedures were legally able to be provided in case of emergency. Additionally, the expert argued that uncertainty and the threat of criminal penalties were "distressing" to physicians.

IV. 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 then asked state legislators to clarify or reconcile conflicting statutes regulating or criminalizing abortions. Consequently, on September 13, the state legislature passed a new statutory, near-total ban on abortion which was signed into law by the state governor shortly thereafter, on September 16.

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. Republican legislators, who are defendants in the lawsuit, filed a request to have the case dismissed on August

22, 2022. To prevent delays in the lawsuit, on September 16, the state attorney general substituted three Wisconsin district attorneys as defendants instead. Additionally, on September 21, Wisconsin Governor Evers announced his plan to call a special session of the state legislature "to 'create a pathway for Wisconsin voters' to repeal the [1849] abortion ban."

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. On September 23, a state county judge permitted the pre-statehood law to take effect, and on September 20, the judge declined to put the order on hold, stating that abortion rights activists were unlikely to succeed on appeal. However, on October 7, an Arizona appeals court temporarily blocked the territorial ban from enforcement. The state attorney general and abortion rights groups subsequently came to an agreement, precluding enforcement of the territorial ban until at least 2023.

V. 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 U.S. Department of Justice (DOJ) 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. 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 broader federal EMTALA requirements to provide stabilizing care. The Idaho legislature has asked the judge to reconsider, asserting that DOJ did not account for the language in EMTALA which instructs physicians to consider "the health of the unborn child."

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, 2022, challenging recent HHS guidance acknowledging that EMTALA can, in some circumstances, require abortion care. On August 23, 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. On October 21, DOJ filed a notice of appeal with the Fifth Circuit Court of Appeals.

In November 2022, DOJ launched an investigation into a **Missouri** hospital regarding an alleged denial of abortion care to a pregnant woman experiencing a medical emergency.

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, sufficient warnings of adverse reactions, and under a physician's supervision. A manufacturer of generic mifepristone, GenBioPro, sued the State of **Mississippi** in 2020, arguing that the state's strict mifepristone requirements (e.g., 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. GenBioPro has since announced its plans to refile the suit in a more favorable jurisdiction. 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.

Additional Resources

The Network for Public Health Law has developed (and is regularly updating) a series of reproductive health resources in the aftermath of the *Dobbs* decision, including: (1) Ballot Measures on Abortion Access; (2) State-Based Abortion Protections; (3) Abortion Access: A Post-*Roe* Public Health Emergency; (4) Key Federal Responses to Protect Abortion Access and Promote Reproductive Health Post-Dobbs; (5) Post-Dobbs Legal Avenues to Abortion Access; and (6) Post-Dobbs Abortion Access Routes: A Primer.

This document was developed by, **Erica N. White, J.D.**, Staff Attorney, **Madisyn Puchebner**, Senior Legal Researcher, 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.