

Reproductive Health and Data in a Post-Roe World

December 7, 2022

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Dobbs v. Jackson Women's Health Organization

The New Legal Landscape

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*Adapted from slides originally developed by
Jennifer L. Piatt, J.D., Deputy Director*

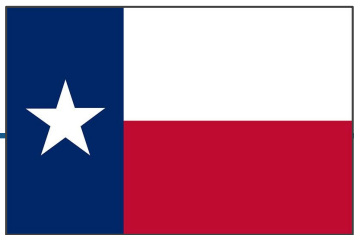
**(1) The *Dobbs* Decision
and Its Impacts**

**(2) The Emerging
Reproductive Health
Legal Landscape**

Roe v. Wade and *Planned Parenthood v. Casey*

Roe v. Wade (1973)

Written by Justice Blackmun, *Roe* guaranteed the individual right to abortion as a *fundamental privacy right*, preventing states from fully banning pre-viability abortions



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*



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.”

2021

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

2018



2022

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



Dobbs: Constitutional Analysis

14th Amendment:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

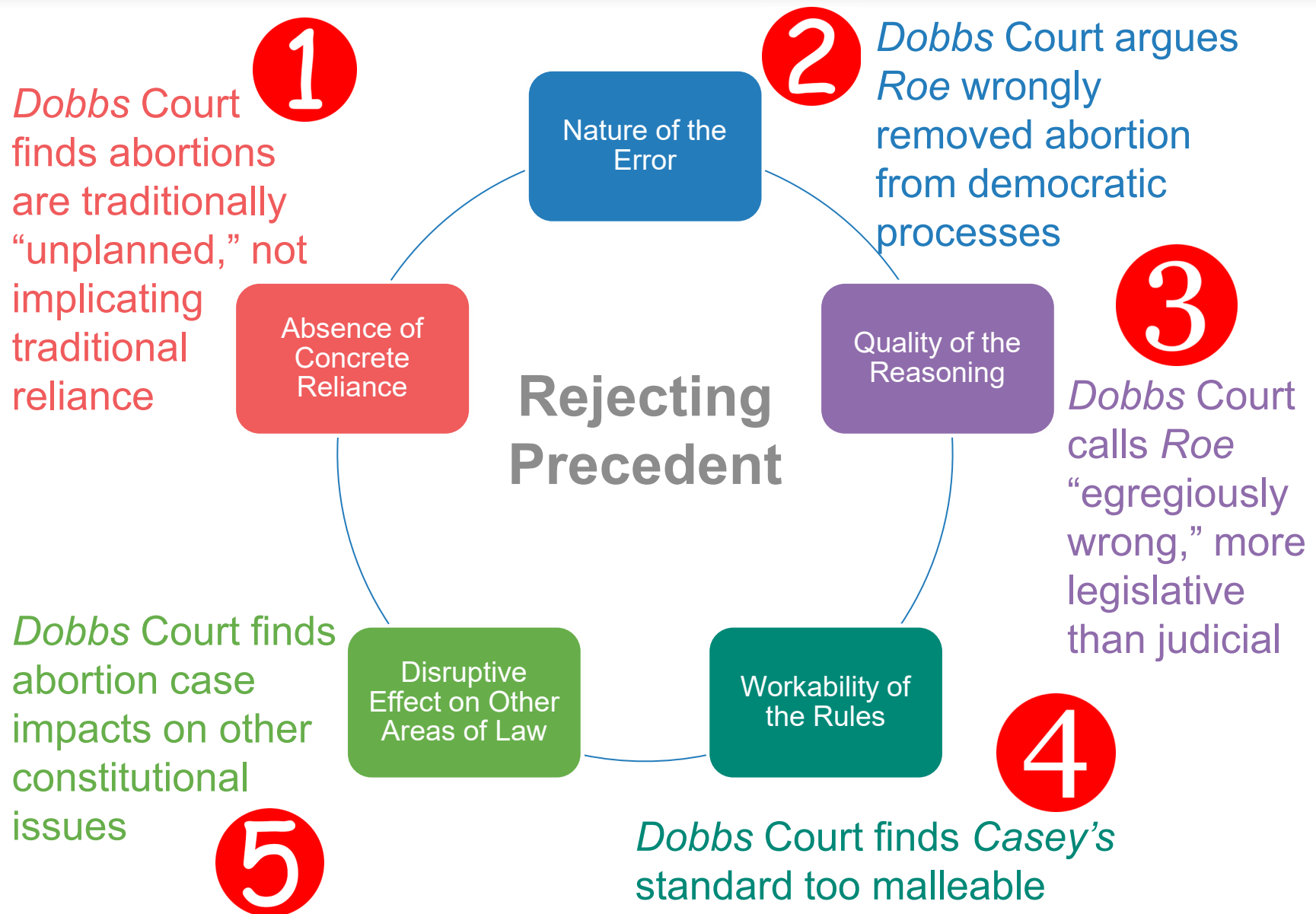


The *Dobbs* Court concluded that abortion is not mentioned in the Constitution's text nor is it deeply rooted in the nation's history and traditions – **it is not a fundamental right.**

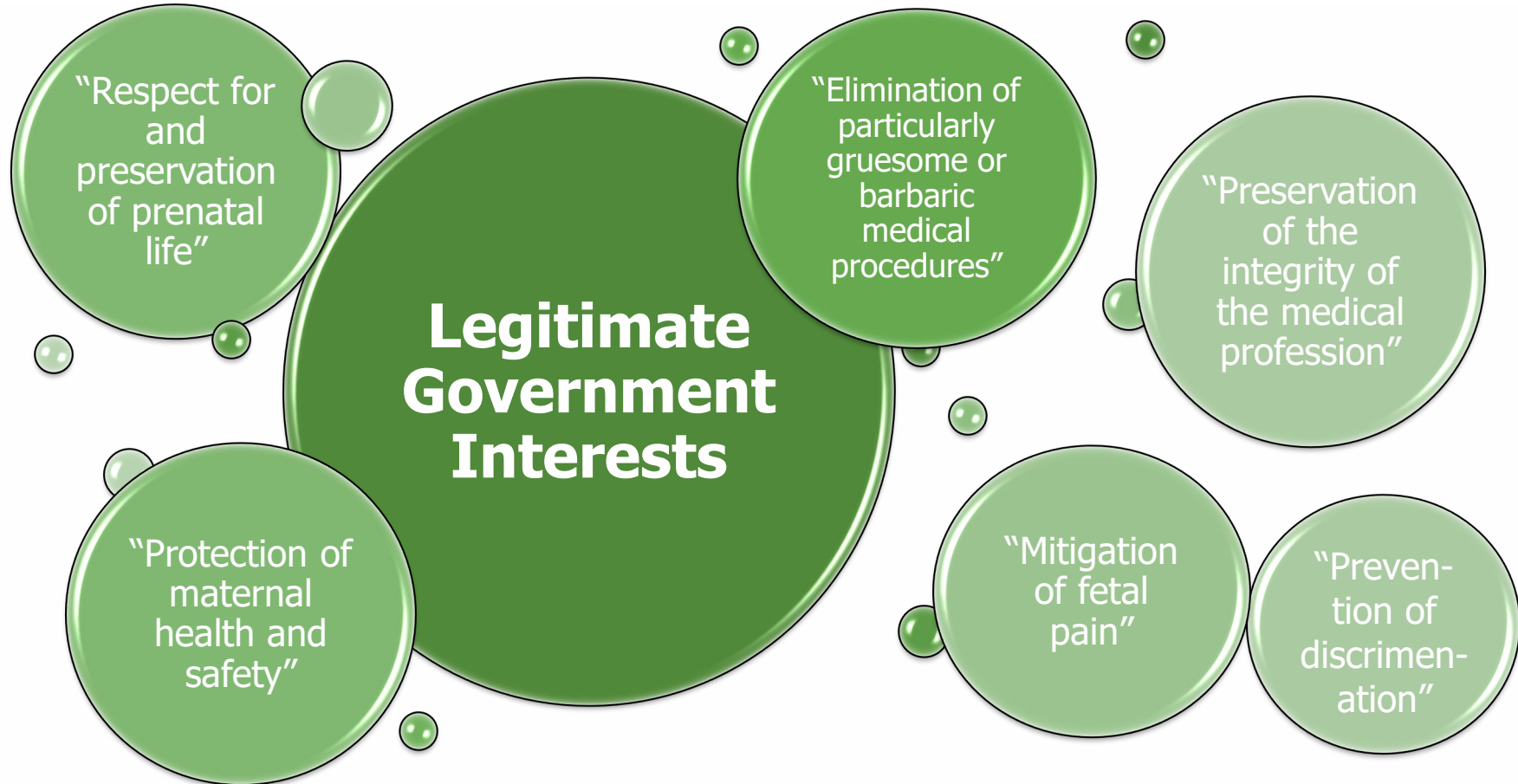
The right to regulate abortion is returned to the states.



Dobbs: Dismissing Roe



Dobbs: A New Standard



Roe

STRICT SCRUTINY

**INTERMEDIATE
SCRUTINY**

**RATIONAL BASIS
REVIEW**

Dobbs

Dobbs: 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.”

Dobbs: Other Opinions



CONCURRENCE

Substantive due process (SDP) should be abandoned & all SDP jurisprudence overruled



CONCURRENCE

Constitution is neutral about abortion so the Court should be too



CONCURRENCE IN JUDGMENT

Judicial restraint – Court need only decide whether the viability line should be upheld

Source: CNN



DISSENT

Dobbs threatens privacy and undermines the Court's legitimacy by overruling 50+ year precedent

The *Dobbs* Decision: Potential Impacts

Majority:

“[W]e emphasize that our decision concerns ***the constitutional right to abortion and no other right.***

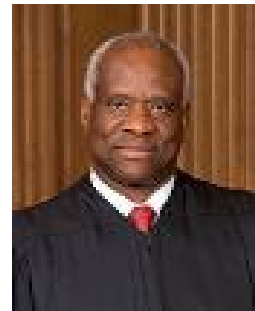
Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”



Marriage
Equality

Justice Thomas Concurrence:

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



PRIVACY

Contra-
ception

Sexual
intimacy

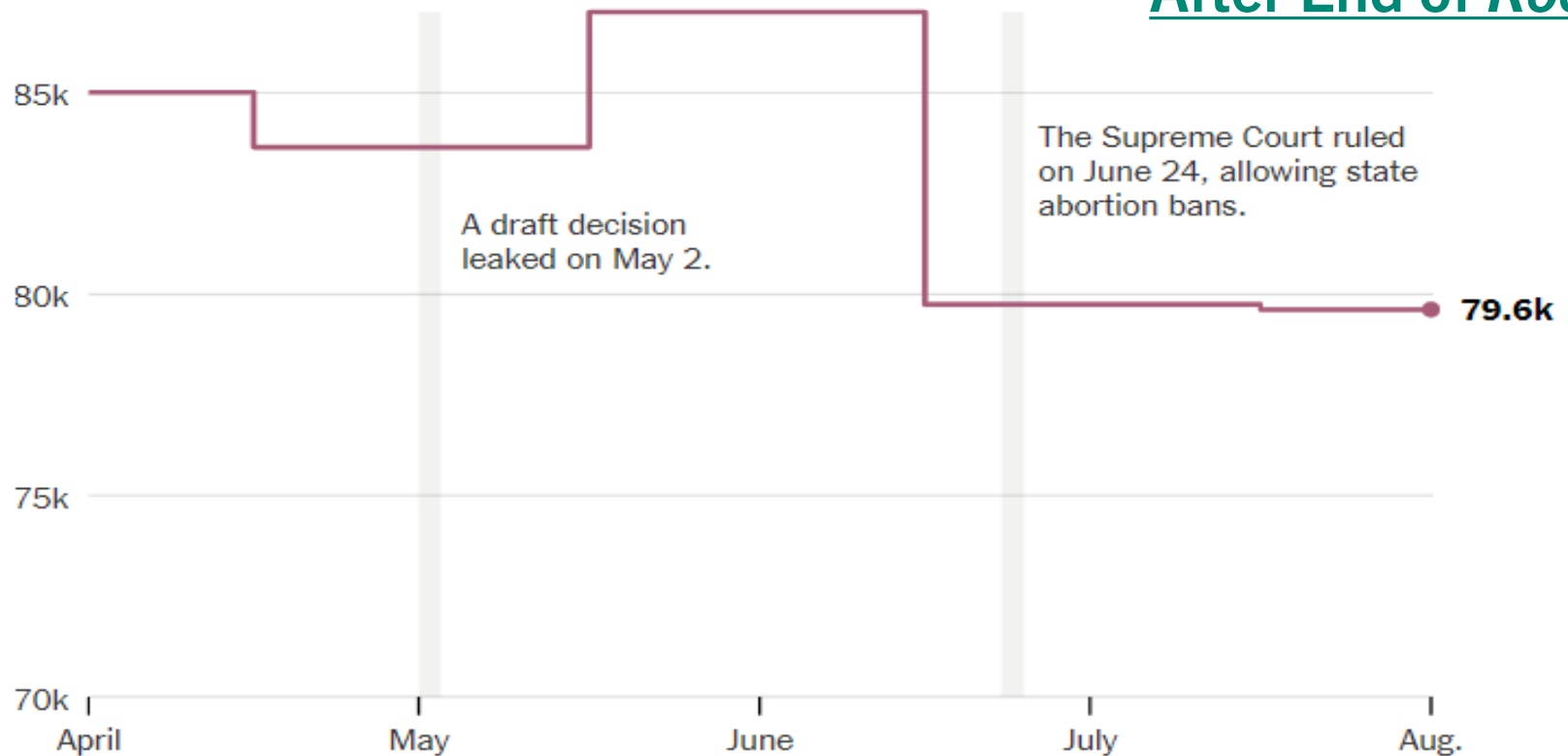




Abortion Post-*Dobbs*

Abortions Fell After Dobbs

Legal abortions



Legal Abortions Fell Around 6 Percent In Two Months After End of *Roe*

Requests for Self-managed Medication Abortion Before and After *Dobbs*, JAMA (Nov. 1, 2022)

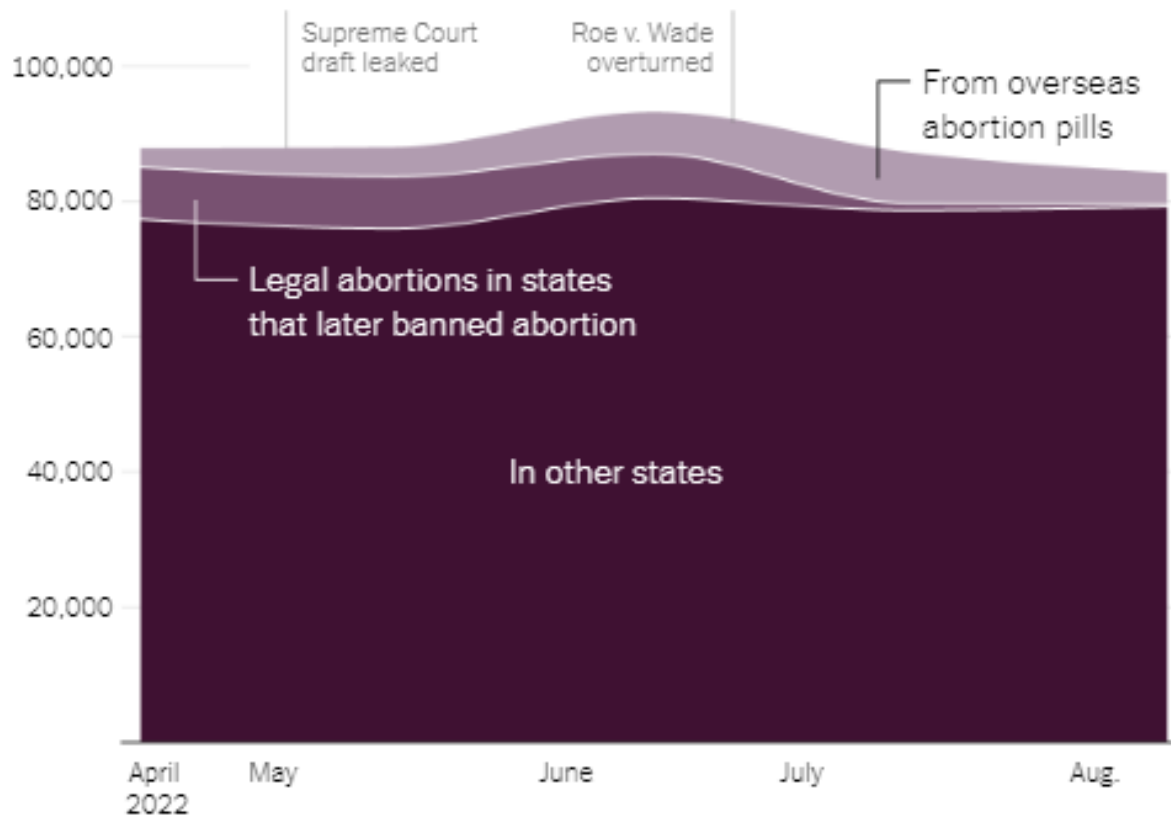
Table. Requestors' Stated Reasons for Requesting Self-managed Medication Abortion by State Abortion Policy Category at Baseline and After the Formal *Dobbs v Jackson Women's Health Organization* Decision^a

Reason for request, by state's abortion policy after <i>Dobbs</i> decision	Baseline (September 1, 2021, to May 1, 2022), %	After decision (June 24 to August 31, 2022), %	Difference, after decision – baseline, % (95% CI)
No ban likely			
Current legal restrictions	3.2	9.2	6.0 (–1.6 to 13.6)
Possible future restrictions	11.5	14.9	3.4 (–6.5 to 13.3)
6-Week abortion ban	0.6	4.6	4.0 (–1.5 to 9.4)
Likely or possible ban			
Current legal restrictions	8.6	25.5	16.9 (15.2 to 18.7)
Possible future restrictions	12.5	35.5	23.0 (21.1 to 25.0)
6-Week abortion ban	2.3	4	1.7 (0.1 to 2.5)
6-Week ban			
Current legal restrictions	10.7	46.6	35.9 (33.8 to 38.0)
Possible future restrictions	14	35.9	21.9 (19.8 to 24.0)
6-Week abortion ban	3.9	28.9	25.0 (23.3 to 26.8)
Total ban			
Current legal restrictions	31.4	62.4	31.0 (29.7 to 32.4)
Possible future restrictions	22.8	33.2	10.4 (9.1 to 11.7)
6-Week abortion ban	26.6	20.5	–6.1 (–7.4 to –5.0)

Abortion Post-*Dobbs*

As Legal Abortions Fell, Overseas Pill Use Climbed

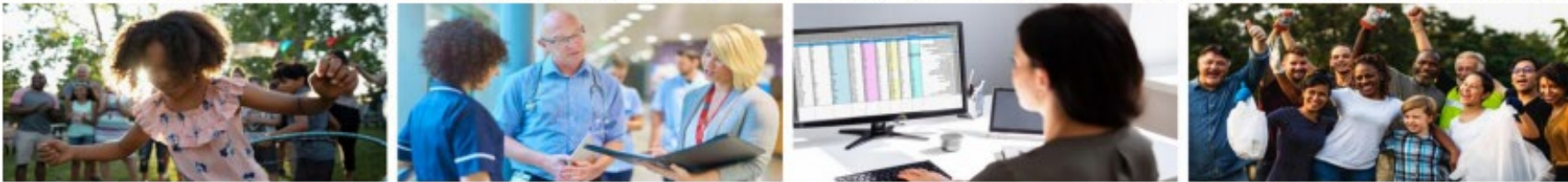
Estimates of abortions in the United States



“Putting both studies together, there were about 2,000 fewer abortions per month, compared with April, when abortion was legal in every state.”

(1) **The *Dobbs* Decision
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(2) **The Emerging
Reproductive Health
Legal Landscape**



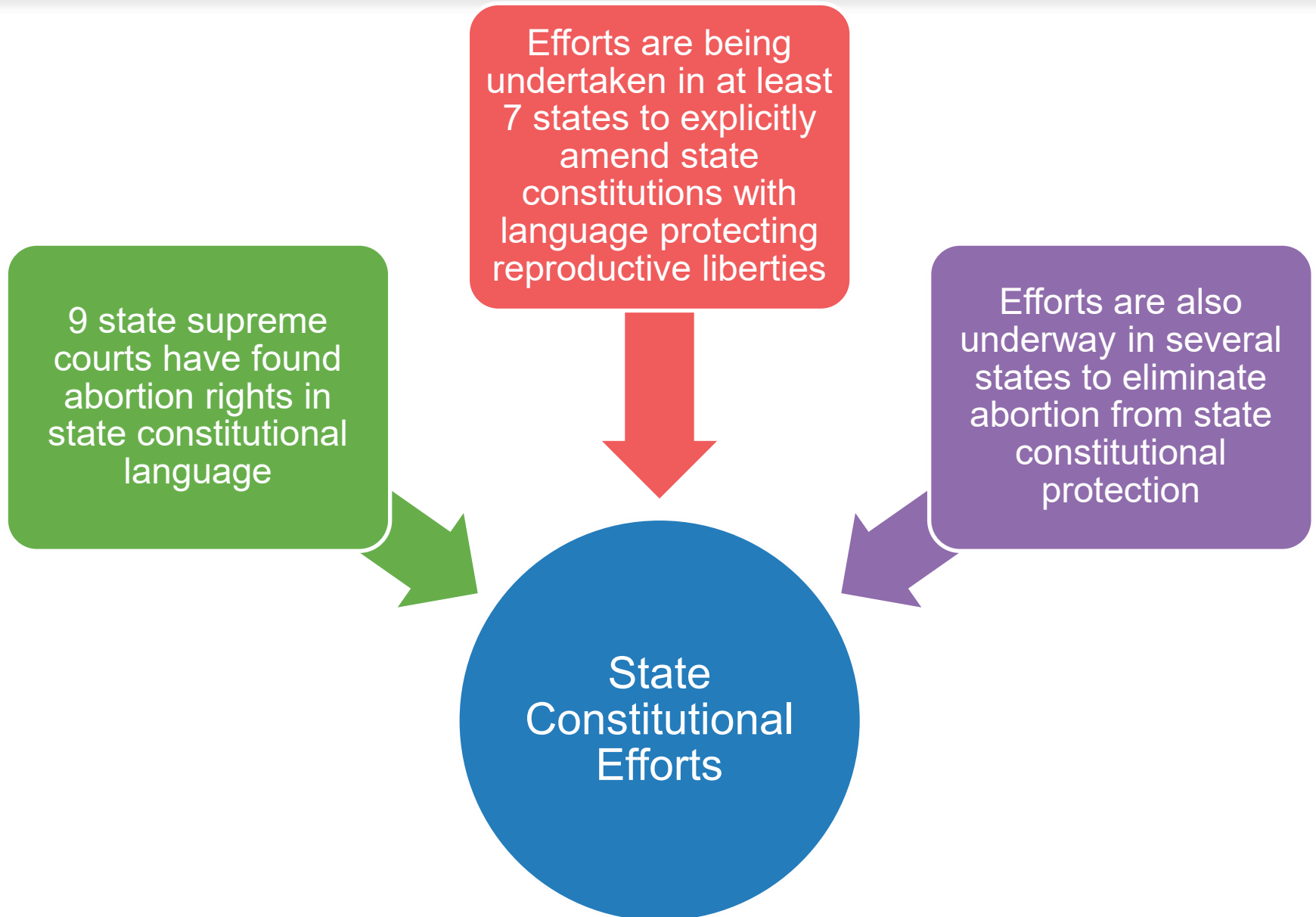
STATE-BASED ABORTION PROTECTIONS

NOVEMBER 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. Monthly updates are posted by the first Friday of each month.

Source: <https://www.networkforphl.org/wp-content/uploads/2022/11/Western-Region-Memo-State-based-Abortion-Protections-1.pdf>

State Protections



State Constitutional Language

New Jersey Constitution

art. 1, sec. 1



“All persons are by nature free and independent, and have certain **natural and unalienable rights**, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”

Alaska Constitution

art. 1, sec. 22



“The right of the people to **privacy** is recognized and shall not be infringed. The legislature shall implement this section.” [Amended 1972]

State Constitutional Interpretation

New Jersey Supreme Court

Right to Choose v. Byrne (1982)

“The right to choose whether to have an abortion, however, is a **fundamental right** of all pregnant women....”

Planned Parenthood of Cent. NJ v. Farmer (2000)

Reaffirming that women have a fundamental right to choose whether to have an abortion.

Alaska Supreme Court

Valley Hospice Association Inc. v. Mat-Su Coalition for Choice (1997)

“[W]e are of the view that reproductive rights are **fundamental**, and that they are **encompassed within the right to privacy** expressed in article I, section 22 of the Alaska Constitution.”

State v. Planned Parenthood of the Great NW (2019)

Reaffirming that the right to reproductive choice is a fundamental right.



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.

1. "Trigger" laws
2. Pre-*Roe* laws
3. Laws violating *Roe* and/or *Casey*

Source: <https://www.networkforphl.org/wp-content/uploads/2022/11/Western-Region-Memo-Abortion-Access-Litigation-Themes.pdf>

Preemption

Federal laws are **supreme** over state laws and are said to **overrule, or preempt**, conflicting state laws.



DOJ sued the state of **Idaho**, alleging the state's near-total abortion ban violated EMTALA. The judge found that the ban was incompatible with EMTALA and was therefore preempted by the federal legislation.



In **Texas**, the Secretary of State sued the Dept. of Health and Human Services, challenging federal guidance that EMTALA requires abortion care. The Texas court found that HHS did exceed its statutory authority by issuing the guidance.

Vagueness

Constitutional principles 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.

Louisiana: abortion providers sued to block the state’s trigger ban, which provided an exception for fatal fetal abnormalities. The Judge agreed that the exceptions to the ban were unclear and the penalties outlined could lead to arbitrary enforcement. However, after an appeal by the Attorney General, the ban is back in effect.



Arizona: a federal judge blocked a state statutory interpretation provision attempting to extend statutory rights to fetuses. The language of the provision provided no meaningful guidance or clarity on the scope of the law.

State Constitution-Based Challenges

Florida's Supreme Court has *already previously determined that the state Constitution protects abortion rights*, but current litigation aimed at reaching the state's newly-constituted Supreme Court seems poised to imitate the *Dobbs* decision at the state level.

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

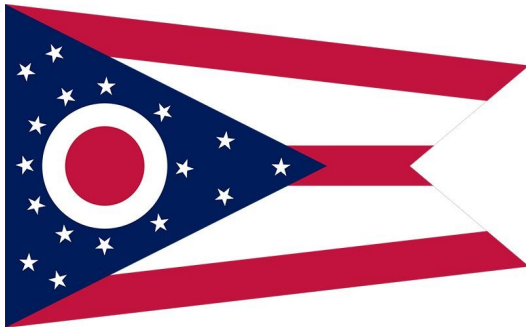
BY JIM SAUNDERS NEWS SERVICE OF FLORIDA

UPDATED JULY 06, 2022 3:15 PM

Miami Herald



In September, an Ohio judge temporarily blocked the state's 6-week abortion ban, *reasoning that Ohio's Constitution protects the right to abortion*.



What a High-Risk Pregnancy Looks Like After Dobbs

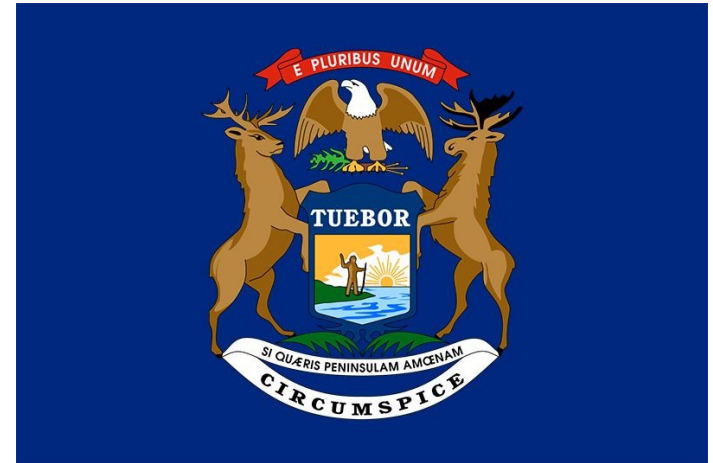
Source: [NY Times](https://www.nytimes.com)

Photographs by Stephanie Sinclair Text by Jaime Lowe

State Constitution-Based Challenges: **Michigan**

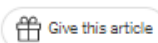
Michigan possesses a **1931 ban on abortion** which could have gone back into effect post-*Roe*; however, in August, a Michigan judge **blocked** the law pending additional litigation.

Michigan's Supreme Court also greenlit the appearance on the **2022 ballot** of a **voter initiative proposing to amend the state Constitution with language expressly protecting reproductive liberties**.



Michigan Voters Will Decide Abortion Rights Question, Court Says

A state board had previously said the issue could not appear on the ballot because of word spacing problems on the petitions.



Source: [NY Times](#)

Updated Nov 10, 2022 - Health

Midterms bring major constitutional wins for abortion rights



Oriana Gonzalez

AXIOS

State Constitution-Based Challenges: **2022 Midterms**



Approved ballot initiative to create **constitutional amendment** creating a right to "reproductive freedom"



Approved ballot initiative adding **constitutional amendment** protecting "an individual's right to personal reproductive autonomy"



Approved ballot initiative to create **constitutional amendment** affirming "fundamental right to choose to have an abortion"



Rejected ballot initiative editing state constitutional to add "nothing in this Constitution shall be construed to secure or protect a right to abortion or require the funding of abortion."

Post-*Dobbs* Abortion Access Routes: A Primer

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Source <https://www.networkforphl.org/resources/post-dobbs-abortion-access-routes-a-primer/>

Post-Dobbs Abortion Access: Open Doors



FDA Preemption



Expanded Medication
Access



Medicaid Waivers



Telehealth



Mobile Clinics



International Access



Minor Access
Opportunities



VA Beneficiaries



Enforcement Discretion



Gubernatorial Pardons



Pharmacies'
Nondiscrimination Obligations



EMTALA



Active Military Access



EUA/PREP Declaration



Employer Travel Benefits



Emergency Contraception

Medicaid Waivers

PATHWAY:

President Biden & the Department of Health & Human Services have expressly encouraged states interested in expanding or protecting abortion access to apply for Section 1115 waivers of Medicaid requirements to potentially receive federal funding for programs designed to help cover travel-related costs for Medicaid recipients seeking abortions across state lines.

COVERAGE:

Medicaid recipients seeking abortions across state lines.

CAVEATS:

No state has yet applied for a waiver, possibly due to the complex application process. The Hyde Amendment bans the use of federal funds to pay directly for abortions, so individuals still need additional funding to pay for the procedure.



PATHWAY:

Telehealth is a [safe](#), available avenue to access medication abortion ([mifepristone](#) & [misoprostol](#)) enabling physicians to prescribe drugs & provide follow-up care via telehealth consultation. In abortion-hostile states, patients [may be able to obtain a prescription using telehealth services](#) which is then filled at an out-of-state pharmacy mailed to or picked up by the patient in an abortion-protective state.



COVERAGE:

Pregnant individuals up to 10 weeks gestation, with some providers prescribing through [12 weeks](#).

CAVEATS:

[FDA previously limited dispensation](#) of mifepristone to use under physician supervision, though [FDA recently moved to modify this stringent control](#). Drugs are only available in states legalizing abortion, subject to litigation. Pharmacies dispensing mifepristone must be [certified](#).

Active Military Access

PATHWAY:

The [Under Secretary of Defense released a memo](#) on June 28, 2022, stating that service members, dependents, other beneficiaries & Department of Defense civilian employees [may continue to access “covered abortions”](#) (e.g., if the life of the mother would be endangered if the fetus were carried to term, or if the pregnancy is the result of rape or incest). On October 20, 2022, the [Secretary of Defense released a memo](#) stating the Department would cover travel costs for active-duty service members who may travel to receive abortion care, not limited to covered abortions.



Source: GAO File Photo.

COVERAGE:

Service members seeking “covered” abortions or traveling for abortions.

CAVEATS:

The military installation may not have a medical facility [capable of performing abortion services](#). Service members must seek leave to travel for abortions not covered under federal law or where the installation is incapable of providing an abortion. [Obtaining leave can be difficult](#), and TRICARE is only available for covered abortions. Thus, even if granted leave and travel funds, there are still great [financial barriers in abortion service expenses](#).

The Next Anti-Abortion Tactic: Attacking the Spread of Information

Dec. 3, 2022 5 MIN READ

The New York Times

With the dismantling of *Roe v. Wade* has come a push to crack down on speech and information about reproductive rights.

Now that abortion has been banned in more than a dozen states, abortion opponents want to stoke confusion about the legality of not just having an abortion, but even of discussing the procedure. The ultimate goal seems to be ensuring that women are unclear about their options to obtain an abortion or contraception, in their home state or elsewhere.

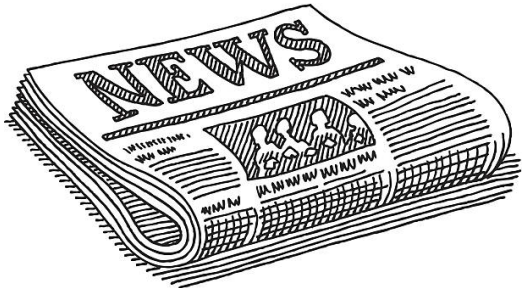
Source: <https://www.nytimes.com/2022/12/03/opinion/abortion-first-amendment-free-speech.html>

First Amendment

Doctors worry that online misinformation will push abortion-seekers toward ineffective, dangerous methods

By Naomi Thomas, CNN

Published 2:57 PM EDT, Wed July 13, 2022



Latinas have long been targeted by abortion misinformation. It's getting worse, experts say.

The Latino community has been targeted by false information that's meant to discourage abortions. Ahead of midterm elections, experts are raising the alarm.



Adrianna Rodriguez

USA TODAY

Published 6:00 a.m. ET Nov. 4, 2022 | Updated 1:46 p.m. ET Nov. 4, 2022

Why Freedom of Speech Is the Next Abortion Fight

A legal battle in Mississippi will test whether states can criminalize those who merely provide information.

By Yascha Mounk

AUGUST 22, 2022

The Atlantic





Thank you!



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After Dobbs: Data Privacy & Reproductive Health Records



Stephen Murphy, Senior
Attorney, Network for Public
Health Law – Mid-States Office

Overview

- Privacy of Reproductive Health Records Post Dobbs
 - *Federal actions*
 - *State actions*
 - *Local actions*

The Washington Post
Democracy Dies in Darkness

Doctor says she shouldn't have to turn over patients' abortion records



By [Kim Bellware](#)

November 19, 2022 at 9:27 p.m. EST

Judge denies emergency motion to block Indiana AG from accessing medical records in investigation of abortion services provided to 10-year-old



By [Artemis Moshtaghian](#), CNN

Updated 10:54 PM EST, Sun December 4, 2022

Texas

After pursuing an indictment, Starr County district attorney drops murder charge over self-induced abortion

- Nurse reports woman to law enforcement
- April 2022 woman charged with murder, held on \$500,000 bond
- District attorney later dismissed the case

Source: <https://www.texastribune.org/2022/07/25/abortion-prosecution-data-health-care/>

Federal Actions

- HHS Sec Becerra remarks June 28, 2022
 - directing OCR to ensure patient privacy and nondiscrimination for patients seeking abortion
 - OCR guidance documents June 29, 2022
 - HIPAA and law enforcement requests for abortion records
 - Digital privacy guidance

Federal Actions

- OCR guidance on HIPAA and law enforcement requests for abortion records June 29, 2022
 - “Privacy Rule permissions for disclosing PHI without an individual’s authorization for purposes not related to health care, such as disclosures to law enforcement officials, are **narrowly tailored to protect the individual’s privacy and support their access to health services**”

Federal Actions

- [OCR guidance on HIPAA and law enforcement requests for abortion records June 29, 2022](#)
 - **Disclosure Required by Law** (45 CFR 164.512(a))
 - Limited to “mandate contained in law that compels... disclosure”
 - **Disclosures to Law Enforcement** (45 CFR 164.512(f))
 - Permits, does not require, disclosure
 - Pursuant to process
 - “Provided that all of the conditions... are met”
 - Doesn’t address several other permitted disclosures to law enforcement
 - Victims of a crime, crime on the premises, death caused by criminal conduct, suspect/fugitive/material witness, missing person

Federal Actions

- OCR guidance on HIPAA and law enforcement requests for abortion records June 29, 2022
 - **Disclosures to Avert Serious Threat to Health or Safety (45 CFR 164.512(j))**
 - Permits disclosures, where permitted by law and professional ethics, to disclose where necessary to prevent or lesson serious and imminent threat to health/safety
 - *Not* consistent with professional ethics to make a disclosure to law enforcement or other person “regarding an individual’s interest, intent, or prior experience with reproductive health care”

Federal Actions

- [OCR digital privacy guidance](#) June 29, 2022
 - HIPAA generally does not protect data collected by mobile devices and apps.
 - search histories, data voluntarily shared on the internet, and location data
 - data on an individual's devices or apps may be seen by, or sold to, third parties
 - advises consumers to
 - avoid downloading needless apps,
 - deny unnecessary app requests to access location data, and
 - disable location services on devices.

NEWS

Medibank: Hackers release abortion data after stealing Australian medical records

🕒 10 November

Federal Actions

- Network for Public Health Law Analysis of HIPAA and Abortion Records
- <https://www.networkforphl.org/resources/the-limits-of-hipaa-in-keeping-reproductive-health-records-private/>



The Limits of HIPAA in Keeping Reproductive Health Records Private

Fact Sheet

Health Data Sharing and Privacy

Legislation and Legal Challenges

Health and Health Care

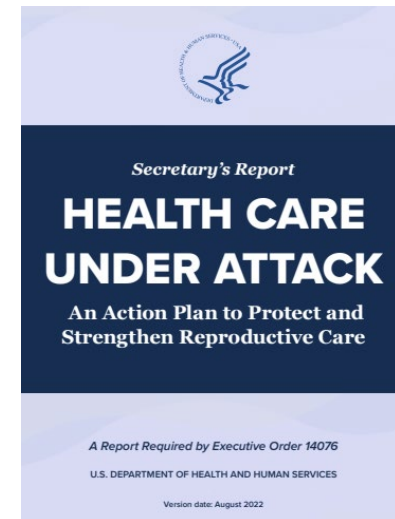
August 2, 2022

by Stephen Murphy

In its recent decision in *Dobbs v. Jackson's Women's Health Organization*, the United States Supreme Court held there is no constitutional right to abortion. The dissenters in *Dobbs* warned of far-reaching state restrictions that may include blocking pregnant individuals from traveling

Federal Actions

- Biden's executive order July 8, 2022 (EO 14076)
 - Directs AG, Homeland Security, FTC, HHS to enhance privacy, safety, security around abortion
 - HHS Secretary Report Health Care Under Attack (Report Required by EO 14076) Aug 26, 2022
 - Cites [HHS HIPAA](#) and [Digital Guidance](#) from June 29
 - Information blocking
 - "Already provide for protection of patient privacy and choice when it comes to sharing electronic health information"
 - Will hold public meetings with health care system about how patients can make informed choices about sharing their data



Federal Actions

POLITICS • ABORTION

Lawmakers Scramble to Reform Digital Privacy After Roe Reversal

- Proposed Legislation
 - My Body, My Data Act
 - Stop Anti-Abortion Disinformation Act
 - Health and Location Data Protection Act
 - American Data Privacy and Protection Act
 - Fourth Amendment is Not for Sale Act

State Action

- California, Oregon, Washington Commitment
- Executive Orders
- Legislative

State Action

- California, Oregon, Washington Commitment Multi-state Commitment to Reproductive Freedom
 - Protect against
 - Judicial and local law enforcement cooperation with out of state investigations
 - Misuse of medical records and other personal and sensitive health information
- Executive Orders (No assistance from executive agencies)
 - California (N-12-22), Colorado (D 2022 032), Maine (4), Massachusetts (600), Michigan (2022-5), Minnesota (22-16), Nevada (2022-8), North Carolina (263), Pennsylvania (2022-1), Rhode Island (22-28)

State Action - Legislative

- California AB 2091 Disclosure of information: reproductive health and foreign penal civil actions (approved by governor)
 - (b) Provider..., health care service plan... shall not release medical information that would identify an individual or that is related to an individual seeking or obtaining an abortion to law enforcement for either of the following purposes, unless that release is pursuant to a subpoena not otherwise prohibited:
 1. Enforcement of another state's law that would interfere with a person's rights [to an abortion under CA law]
 2. Enforcement of a foreign penal civil action

State Action - Legislative

- Connecticut (Connecticut Public Act No. 22-19 (2022)).
 - Health care providers may not disclose any communication or information received from a patient, or from physical exam, relating to reproductive health care services permitted under the laws of Conn. in any proceeding (civil, probate, legislative, admin) without a patient's written consent
 - Contains exceptions

State Action - Legislative

- N.Y. C.P.L.R. 3119 (McKinney)
 - (g) No court or county clerk shall issue a subpoena under this section in connection with an out-of-state proceeding relating to any abortion services or procedures which were legally performed in this state, unless [the out of court proceeding is brought by patient]

State Action - Legislative

- N.Y. Exec. Law § 837-w (McKinney)
 - No state or local law enforcement agency shall cooperate with or provide information to any individual or out-of-state agency or department regarding the provision of a lawful abortion performed in this state.
 - ...no information relating to any medical procedure performed on a specific individual may be shared with an out-of-state agency or any other individual. Nothing in this section shall prohibit compliance with a valid, court-issued subpoena or warrant.

State Action - Legislative

- N.Y. C.P.L.R. 3102 (McKinney)
 - (e) [S]upreme court shall issue no order in aid of a deposition [as part of an action pending in another jurisdiction] in connection with an out-of-state proceeding relating to any abortion services or procedures which were legally performed in this state....

State Action - Legislative

- Pennsylvania House Bill 2574 Protecting Pregnant Person Privacy
 - Limited services pregnancy center may not disclose nonpublic personal health information about an individual unless an authorization is obtained.
 - Exceptions
 - if disclosure is required to comply with laws, a civil, criminal or regulatory inquiry, investigation, subpoena or summons or to cooperate with law enforcement concerning conduct the service provider reasonably believes may violate Federal, State or local laws.

State Action - Legislative

- New Jersey A-3975/S-2633
 - NJ public entity or employee shall not provide any information or expend resources in furtherance of any interstate investigation or proceeding seeking to impose civil or criminal liability upon a person or entity for:
 - (1) the provision, receipt, or seeking of, reproductive health care services that are legal in this State; or
 - (2) assisting, advising any person or entity providing, receiving, or inquiring about, reproductive health care services

State Action - Legislative

[U.S. NEWS](#) [ABORTION](#) [APPLE](#) [REPRODUCTIVE RIGHTS](#)

States Press Apple To Protect Reproductive Health Data

Ten attorneys general are raising concerns about information privacy in the wake of the Supreme Court decision overturning *Roe v. Wade*.

- CA, CT, DC, IL, MA, NC, OR, VT, WA
 - Nov. 21, 2022 AG letter concerning reproductive health data on Apple's App Store: deleting data, providing notices, and compliance with Apple's Privacy Standards

Local Action

Athens-Clarke County, GA ([Resolution 8/2/22](#));
Atlanta, GA ([22-R-3711](#));
Boise, ID ([Res-385-22](#));
New Orleans, LA (R-22-310)
Austin, TX ([20220721-02](#));
Dallas, TX ([Resolution No. 22-1140](#));
Denton, TX (ID-22-1275);
San Antonio, TX ([Resolution, 7/26/22](#));
Travis County, TX ([Medical Access Resolution](#))

Prohibiting city/county funds from being used to:

- Store or catalogue reports on abortion...
- **Provide information to any other govt body or agency about an abortion, unless defending rights of patient or health care provider**
- Conducting surveillance or collecting information to determine whether abortion has occurred

Source: Meeting the Moment Post-Dobbs, A Review of Proactive Abortion Policies Passed in States and Localities, June 24 – Oct. 1, 2022, National Institute for Reproductive Health (Nov. 30, 2022), <https://nirhealth.org/resources/meeting-the-moment-post-dobbs/>

Local Action

September 21, 2022

City Council Passes Bodily Autonomy Ordinance in an Effort to Protect Those Seeking Reproductive Healthcare

Philadelphia, PA – Reproductive Freedom Package (three bills approved in committee Nov. 11, 2022)

- Would bar health care providers from sharing reproductive healthcare information if they know or should know the info will be used for litigation

Chicago, IL – Bodily autonomy ordinance (Sept. 21, 2022), Mayor's executive order

- No cooperation with investigations by another jurisdiction

Sources: City Council Committee Passes Abortion Protection Package, The Philadelphia Tribune

Conclusion

- Post Dobbs, risk of harm from sharing of personal reproductive health data ever present
- Federal guidance around HIPAA and digital privacy
- HIPAA is not iron clad
- Several states have taken action toward barring handing over reproductive health information to out-of-state prosecutors and law enforcement
- The picture continues to develop

After Dobbs: Data Sharing & Reproductive Health Records



Carrie Waggoner, Deputy
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Overview

- HIPAA Post-*Dobbs*
- Abortion Reporting Laws
- Data Sharing Analysis Post-*Dobbs*

HIPAA Post-*Dobbs*: Business as Usual?



- **Generally, yes.**

- HIPAA applies to covered entities that *use or disclose* protected health information (45 CFR § 160.103)
- Written authorization is required to use or disclose PHI (45 CFR §§ 164.502, 164.508), with certain exceptions:
 - *Treatment, Payment, & Healthcare Operations (TPO)* – (45 CFR § 164.506)
 - *As required by law* – (45 CFR § 164.512(a))
 - *Public Health Activities* – (45 CFR § 164.512(b))
- **Unless state law provides greater protection, HIPAA applies to abortion and sexual health-related PHI in the same way it did before the *Dobbs* decision**

Abortion Reporting Laws

- 46 States and DC require hospitals, healthcare facilities, and physicians providing abortions to make reports to the state*
 - Variety of reporting requirements such as **method of payment, post-abortion complications, reason for seeking an abortion, whether fetus was viable**, etc.
- HIPAAs required by law and/or public health exception likely apply to disclosure of PHI to the state (45 CFR § 164.512(a), (b))

*Source: [Abortion Reporting Requirements | Guttmacher Institute](#)

What is the data sharing analysis post-Dobbs?

- Gather information to assess:
 - Who, what, why, how much?
- What laws apply?
 - HIPAA? State abortion reporting laws? State privacy laws? Other laws?
- Analyze law(s) with the facts (and your legal counsel) to assess whether information can be shared
- If data can be shared, what protections are in place?

What is the data sharing analysis post-Dobbs?

- **Facts:** A researcher with a state university wants access to abortion-related data held by state department of health and human services for the purpose of assessing abortion outcomes across communities. DHHS is a HIPAA hybrid entity, and HIPAA applies to the data requested. While the data requested does not contain direct identifiers (e.g., name, DOB) it is PHI.
- **Law:**
 - HIPAA applies; look to *research exception* (45 CFR § 164.512(i))
 - State law – look to any *abortion-related, health care, and general privacy laws*
 - Other laws – *Common Rule may apply if this is human subjects' research* (45 CFR 46)

Wrapping up...

- HIPAA applies as it did before the Dobbs decision
- Most states require some reporting on abortions
- Need to analyze facts, determine applicable laws to assess data sharing*
- Outside of law enforcement context – legal landscape on data sharing is largely the same
- Just because you *can* share data does not mean you *have* to share data

*Resource: [Checklist of Information Needed to Address Proposed Data Collection, Access and Sharing - Network for Public Health Law \(networkforphl.org\)](https://networkforphl.org/checklist-of-information-needed-to-address-proposed-data-collection-access-and-sharing/)

Thank you!!

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