

# U.S. Supreme Court Nullifies Constitutional Right to Abortion

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## The U.S. Supreme Court's Nullification of the Constitutional Right to Abortion: Practical Considerations

### Introduction

On June 24, 2022, the Supreme Court of the United States issued its decision in the case, *Dobbs, State Health Officer of the Mississippi Department of Health, et al. v. Jackson Women's Health Organization et al.*, 597 U.S. \_\_\_\_ (2022), which concluded that the United States Constitution does not confer a right to abortion. The decision has the effect of overruling the landmark cases, *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and, as a result, now leaves the issue of abortion to each individual state's rulemaking.

### Background

By way of background, in *Roe*, the Supreme Court ruled that the constitutional right to privacy includes a woman's qualified right to terminate her pregnancy, thus establishing a nationwide constitutional right to abortion, and, in *Casey*, the Supreme Court partly reaffirmed *Roe* but replaced *Roe*'s trimester structure with a fetal viability standard (24 weeks into pregnancy). *Roe* held that the abortion right is part of a right to privacy that springs from the First, Fifth, Ninth and Fourteenth Amendments, while *Casey* grounded its decision on the theory that the right to obtain an abortion is part of "liberty" protected by the Fourteenth Amendment's Due Process Clause. In re-affirming *Roe*'s right to abortion, *Casey* relied in part on *stare decisis*, a cornerstone legal premise that requires courts to give weight to precedent when ruling on a similar case.

### Mississippi Law Challenged

In *Dobbs*, the Supreme Court considered the constitutionality of Mississippi's Gestational Age Act, a 2018 law that bans abortions following the first 15 weeks of pregnancy, other than for medical emergencies or severe fetal abnormality, but with no exception for rape or incest. The Supreme Court ruled 6-3 to reverse the lower court rulings in *Dobbs* and 5-4 to overturn the *Roe* and *Casey* decisions, thus striking down the federal protection of abortion and leaving a woman's right to choose to each individual state's lawmaking.

### Supreme Court's Majority Decision

The majority decision in *Dobbs* (authored by Justice Alito and joined by Justices Thomas, Gorsuch, Kavanaugh and Barrett) found that abortion is neither explicitly protected by the Constitution, as abortion is not mentioned by the Constitution, nor implicitly protected by the Due Process Clause of the Fourteenth Amendment as a matter of right because any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" to be so implicitly protected, and the Court did not find those elements to be present with abortion.<sup>1</sup> The Court reasoned that *stare decisis* should not save *Roe* or *Casey* from being overturned, as that doctrine is not immune from attack when circumstances warrant a closer look. The Court

found that *Roe* was not grounded in “any constitutional text, history, or precedent,”<sup>2</sup> thus undercutting its merits, and that *Casey*’s emphasis on *stare decisis* in adhering to *Roe* was misplaced. Going forward, the Court indicated that “rational basis review” is the appropriate standard to apply when state abortion regulations undergo constitutional challenge.<sup>3</sup> Per the Court, this means that “[g]iven that procuring an abortion is not a fundamental constitutional right, it follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot ‘substitute their social and economic beliefs for the judgment of legislative bodies.’ That applies even when the laws at issue concern matters of great social significance and moral substance. A law regarding abortion, like other health and welfare laws, is entitled to a ‘strong presumption of validity.’ It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.”<sup>4</sup> On the basis of the foregoing, the Court determined that, as “the Mississippi law is supported by the Mississippi Legislature’s findings, including the State’s asserted interest in protecting the life of the unborn,”... “that these legitimate interests provide a rational basis for the Gestational Act.”<sup>5</sup>

Justice Alito’s decision is rooted in “originalism,” a legal philosophy that involves scrutinizing the Constitution’s language to glean guidance on contemporary disputes; the basis for Alito’s apparent rationale is that the Fourteenth Amendment’s protections of freedoms that are not explicitly mentioned in the Constitution must be limited to those rights that were understood to exist deep in the Nation’s history, particularly at the time when the Amendment became law (in 1868). This contrasts with the competing philosophy that views the Constitution as a living document, the meaning of which can and should evolve with society.

## Supreme Court’s Concurring and Dissenting Opinions

While the majority opinion expressly limited the Court’s decision to abortion rights, in his concurring opinion, Justice Thomas opined that the same rationale that the Supreme Court used to declare there was no right to abortion, should also be used when considering cases that challenge established rights to contraception, same-sex consensual relations and same-sex marriage.<sup>6</sup> In a separate concurring opinion, Justice Kavanaugh explained the urgency of overruling *Roe* now, as it “has caused significant negative jurisprudential or real-world consequences,”<sup>7</sup> and noted that, as the Constitution is “neither pro-life nor pro-choice,” the issue should be left to “the people and their elected representatives to resolve through the democratic process in the States or Congress.”<sup>8</sup>

The dissenting opinion (Justices Breyer, Sotomayor, and Kagan) concluded, in pertinent part, that the majority opinion discarded the balance between women’s rights and those of the unborn established by prior abortion decisions, thus consigning “women to second-class citizenship” and placing an undue burden on low-income pregnant women in particular.<sup>9</sup> The dissent notes that the Constitution does not freeze for all time its original view of “liberty” and “equality.” Rather, the application of those rights can adjust based on new societal understandings and conditions.<sup>10</sup> The dissenting Justices took issue with the majority’s failure to abide by *stare decisis*. Under the established rule, courts must have a good reason to overrule an earlier decision “over and above the belief ‘that the precedent was wrongly decided.’”<sup>11</sup> The dissent opined that none of the traditional *stare decisis* factors support overruling *Roe* and *Casey*.

In his concurrence in part, Justice Roberts argued that the Court should uphold Mississippi’s ban on abortions after 15 weeks of pregnancy without entirely abolishing a constitutional right to abortion, representing a unique approach not taken by the other five conservative members of the Court. In his admittedly “more measured course,” Justice Roberts opined that a woman’s right to terminate a pregnancy “should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further certainly not all the way to viability.”<sup>12</sup>

## Reactions by States

States are reacting to the *Dobbs* decision with differing approaches. While a majority of states, 26, are certain or likely to now ban abortion to the fullest extent possible,<sup>13</sup> 13 of these have so-called “trigger bans” that take effect in the wake of *Dobbs*, either immediately, within a 30-day timeframe, or after some quick state action.<sup>14</sup> Of the 26 states, some include trigger laws, some maintain pre-*Roe* abortion bans on the books, and some have early gestational age bans that have been blocked by court order.

Sixteen states and Washington D.C. have laws that protect the right to abortion,<sup>15</sup> with 4 states and D.C. codifying the right to an abortion throughout pregnancy, and the remaining 12 states permitting abortion prior to viability or when necessary to protect the life or health of the pregnant person.<sup>16</sup> Some of these laws include protecting abortion from state interference, defining abortion as a fundamental right,<sup>17</sup> expanding the scope of health care professionals that can provide abortions to include non-physicians, and expanding “safe harbor” protections to individuals seeking abortions from other states and the clinicians who provide them.<sup>18</sup>

## Practical Impacts of *Dobbs* Decision

Now that *Dobbs* has become the law, what are the practical ramifications of this landmark case? The *Dobbs* decision will have an impact on many constituents.

### **Health Care**

There is little doubt that many health care providers across the country are contemplating the profound impact that *Dobbs* will have on their ability to provide reproductive health care services to their patients. With the nullification of a woman’s federal constitutional right to an abortion, health care providers will not only need to navigate the state laws affecting a woman’s reproductive health care rights in the states in which they practice, but they will also have to be cognizant of whether the state law of a patient’s origin limits their ability to provide reproductive health care to such patients. Although, the jurisdictional reach of such laws is highly questionable,<sup>19</sup> it is yet to be seen how aggressive some states will become.

Not surprisingly, upon release of the *Dobbs* decision, President Biden<sup>20</sup>, the United States Attorney General (Merrick Garland)<sup>21</sup>, the American Hospital Association<sup>22</sup>, the American Medical Association<sup>23</sup>, the Association of American Medical Colleges<sup>24</sup>, the Centers for Medicare and Medicaid Services<sup>25</sup>, and the American College of Surgeons<sup>26</sup>, to name a few, have issued strong statements denouncing the *Dobbs* decision. The consensus from these leaders and health care organizations is that *Dobbs* wrongly interferes with a woman’s right to comprehensive reproductive health care, and will disproportionately impact the economically marginalized populations who already have challenges accessing health care. While reproductive rights advocates seem fully committed and energized to finding a path to preserve a woman’s right to an abortion, health care providers now face a quagmire of legal issues. The following sets forth some preliminary issues for health care providers, pharmacies and medical device manufacturers to consider during this volatile period in the law:

1. Check with your counsel as to whether there are any state laws that limit or completely restrict your ability to advise or provide any reproductive health care services. If you are a pharmacy or medical device manufacturer that mails Federal Drug Administration (FDA) approved products into a state with restrictive reproductive laws, the federal Interstate Commerce Clause may pre-empt the applicability of such restrictive state laws. According to Merrick Garland, the United States Attorney General, “[s]tates may not ban Mifepristone<sup>27</sup> based on disagreement with the FDA’s expert judgment about its safety and efficacy.”<sup>28</sup> However, such pronouncements do not mean that makers of hormonal medications and other medications

that function as emergency contraception or as abortifacients will not be targets of civil or criminal litigation in certain states.

2. Determine whether your patient's health benefits plan covers the particular reproductive health care services that the patient needs. As discussed herein, while self-funded plans, with limited exceptions, are unlikely to be subject to state laws banning abortion or other reproductive services, health insurance plans are likely to be subject to the laws of the state in which they do business, whether the state bans abortion or requires insurance to cover the cost of abortion, as Maryland has done.<sup>29</sup> Currently, 16 states cover abortion procedures under their Medicaid state plans.<sup>303132</sup> At this time, it is unknown whether Centers for Medicare & Medicaid Services (a federal agency that administers the Medicare program and works in partnership with state governments to administer Medicaid, the Children's Health Insurance Program and health insurance portability standards) will require all states that participate in Medicaid to cover abortion procedures, including emergency contraception or abortifacients.
3. It is also currently unclear whether the Secretary of Health and Human Services will promulgate new rules under the Emergency Medical Treatment and Active Labor Act for hospitals participating in Medicare with respect to the provision of certain emergency reproductive services such as when a woman has been raped, has experienced a miscarriage or is suffering from an ectopic pregnancy or septic uterus. Please note that many of the medications that are used to induce an abortion are also prescribed for miscarriages.
4. Check your state privacy laws as some states, such as Connecticut, have or will enact laws that prohibit (with limited exceptions, e.g., reporting child abuse) a "Covered Entity" under the Health Insurance Portability and Accountability Act (HIPAA) from disclosing any information regarding the provision of reproductive health services without the patient's or their legally authorized representative's specific written authorization. Therefore, while a disclosure may be permissible under HIPAA, a state law that further restricts the disclosure of reproductive health information must be adhered to with respect to the protection of the patient's privacy. In addition, some states will bar authorities from cooperating with an out-of-state action (e.g., the issuance of a subpoena) relating to reproductive health services in certain circumstances.<sup>33</sup> Please also note that the enactment of state laws relating to reproductive health services may necessitate an amendment to providers' Notice of Privacy Practices under HIPAA.
5. Some states may also enact laws that shield health care providers and patients who travel to other states to seek abortions in their state from being held liable in the state in which they provided or received the reproductive health services, further including the right to recover damages and costs relating to such action. For example, in Connecticut, health care providers cannot be extradited to other states in connection with reproductive health services claims.<sup>3435</sup>

## Employee Benefits

In response to the *Dobbs* opinion and resulting restrictions on abortion services in some states, a number of national employers have announced their intentions to offer travel benefits to their employees to access those services in other states through their employer health plans. Although the ability to reimburse amounts expended to travel for medical care is not new, employers are taking a fresh look at this benefit. Depending upon an employee's location and the legal landscape of states that ban abortion, an employee possibly could have to travel hundreds of miles to get an abortion, which may or may not be feasible. The legal considerations with offering any employer-based travel benefit (i.e., whether to offer it under the employer health plan or as a stand-alone employee benefit) can be complicated and requires careful analysis. This section focuses solely on the implications of offering a travel benefit through the employer's health plan. Each employer who wants to offer this benefit must decide the approach that best aligns with their existing benefit designs and participant populations.

Group health plans can generally offer abortion coverage on a tax-free basis, because abortion falls within the definition of “medical care” under Internal Revenue Code Section 213(d). One caveat is that only health care services that are legal under the law qualify as medical care, so abortion would not be so covered in states where it is illegal. However, travel to obtain legal medical care may also be covered by a group health plan, allowing pre-tax reimbursements for lodging and transportation, up to certain limits (currently, lodging up to \$50 per person per night and reasonable travel costs). Any amounts reimbursed over and above the Internal Revenue Code limits will need to be imputed as taxable income to employees. Additionally, employers with a high deductible health plan should ensure that participants satisfy the plan’s deductible before being eligible for travel reimbursement.

Two threshold questions for employers to consider are (1) the geographical makeup of their employee population and (2) whether they currently have an insurance company plan or a self-insured health plan. If an employer’s workforce is only in states that do not restrict access to abortion, providing a travel benefit will not be necessary. Additionally, employers with self-insured health plans have more flexibility to amend their plans to enhance benefits than employers with fully insured group health plans, where the insurance company is largely responsible for plan design.

These considerations are noteworthy not just for their practical considerations, but also for how they affect preemption under the Employee Retirement Income Security Act of 1974 (ERISA). It is currently unclear to what extent individual state laws that penalize aiding or abetting an abortion would apply to an employer sponsoring a travel benefit as described here. Companies interested in offering this benefit should work with their legal counsel to understand the laws of the various states where they have employees. ERISA preempts state laws that relate to an ERISA plan, so one could argue laws limiting travel benefits would be preempted. However, ERISA preemption does not apply to insured products (such as with fully insured plans) or to any criminal laws that might apply to the covered service.

As of this writing, more than 20 companies have publicized their intention to add some variation of a travel benefit for out-of-state abortions for their employees. As that list grows, we hope there will also be guidance from the Internal Revenue Service and/or the Department of Labor on the myriad of new issues raised by this benefit and the impact of the *Dobbs* decision.

## First Amendment Considerations

The Court’s decision in *Dobbs* has already resulted in a variety of protests, and employers, both public and private, must consider whether and how expressions of opinion about the *Dobbs* decision will be permitted in the workplace and in our schools. Significantly, the normal rules apply, and a brief reminder of those rules may be helpful.

Public employees have free speech rights that derive from the First Amendment. Employees of private employers may have free speech protections based on state law, such as Conn. Gen. Stat. § 31-51q in Connecticut, which confers certain free speech protections for employees in the private sector. Generally speaking, speech is protected when (1) it relates to a matter of public concern, and (2) the importance of the speech outweighs any disruptive impact of the speech. Clearly, the *Dobbs* opinion raises an issue of public concern. Accordingly, expressions of opinion (one way or the other) outside of the workplace will be protected speech, even if vehemently stated, except in extreme cases that involve threats of violence or disruption.

In the workplace, the rules are different, and whether such speech will be allowed (in the form of signs or buttons) will depend on established expectations and also state law. The workplace is not typically a forum for free speech, and employers are free to enforce expectations that prohibit such employee speech in general without regard to the content of the speech. However, if an employer has permitted such personal speech in the workplace, it must be careful not to prohibit speech about the *Dobbs* opinion unless and until the speech becomes disruptive. Connecticut



law has some other peculiarities when it comes to free speech, so employers should seek legal advice if and when this become an issue.

In our schools, students retain their free speech rights as well, and they are free to speak out or wear buttons or T-shirts regarding this matter, subject to the following limitation: When school administrators reasonably forecast material disruption or substantial interference with the educational process, they may restrict student speech. The disruption standard is high, however, and school officials should be cautious before moving to restrict student speech concerning this case.

## Other Employment Considerations

Employers in the healthcare field and in other fields may face additional employment issues following the issuance of the *Dobbs* opinion. For example, during the COVID pandemic, many employers had to address employee conflicts about masks, vaccines, and related political issues. The *Dobbs* opinion may raise similar concerns in some workplaces, with employees holding strong opinions on both sides of this issue. Before such conflicts arise, employers should review their existing policies and determine if they appropriately address things such as speech in the workplace, professionalism, and discipline. As noted above, such policies can address not only verbal speech, but also things such as dress codes, displays of signs or banners, and language that may be included in e-mail signature blocks. As further noted above, employers must also review the state and local laws related to speech in each jurisdiction where they operate, as some jurisdictions, such as Connecticut, have legislative protections for speech in private workplaces. In addition, employees in states that prohibit or significantly restrict abortion should review their policies that may be impacted by an employee's request for time off related to an abortion, similar medical care, or to travel for such care.

## Other Practical Ramifications

Women whose access to abortion has been eliminated in their home state may find themselves having to seek access to abortion through an out-of-state provider, which may not be readily accomplished for financial or practical reasons. Inter-state health care providers will have to deal with a more complicated regulatory framework (see above). The inter-state sale of abortion pills, by mail, will likely evolve and be tested. Due Process Clause and right to privacy advocates will fear the slippery slope that *Dobbs* may create (and one which was expressly advocated by Justice Thomas in his concurring opinion), as the rights to contraception (established by the Supreme Court in *Griswold v. Connecticut*)<sup>36</sup>, same-sex consensual relations (*Lawrence v. Texas*)<sup>37</sup> and same-sex marriage (established by the Supreme Court in *Obergefell v. Hodges*)<sup>38</sup> may come under attack now that *Dobbs* has apparently stripped away the Fourteenth Amendment's previously interpreted right to abortion.

## Concluding Thoughts

Now that *Dobbs* has overturned *Roe* and *Casey*, there will likely be a surge of activity at the state level seeking to permit, restrict or prohibit abortion, depending upon each state's legislative leanings and the views of its constituents. *Dobbs* holds that, going forward, the rational basis review standard will apply to cases that constitutionally challenge legislative rule making on abortion. There may be pressure for Congress to pass into law some form of nationwide legalization of abortion, so as to achieve through federal lawmaking what the *Dobbs* decision has undone from a judicial standpoint. *Dobbs* will generate a wave of challenges, lawmaking, polarizing protests and regulatory issues, and we will continue to monitor these developments and assess their impact on affected constituents in future publications.

## Questions or Assistance

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## End Notes

1. *Dobbs*, p. 12.
2. *Dobbs*, p. 46.
3. *Dobbs*, pp. 7, 77-78,
4. *Dobbs*, p. 7.
5. *Dobbs*, p. 8 and p. 78.
6. Concurring Opinion of Justice Thomas, p. 3.
7. Concurring Opinion of Justice Kavanaugh, p. 7.
8. Concurring Opinion of Justice Kavanaugh, pp. 2-3.
9. Dissenting Opinion of Justices Breyer, Sotomayor and Kagan, p. 15.
10. Dissenting Opinion of Justices Breyer, Sotomayor and Kagan, pp. 16-17.
11. Dissenting Opinion of Justices Breyer, Sotomayor and Kagan, p. 31.
12. Concurring Opinion in Part of Justice Roberts, p. 1.
13. <https://www.gutmacher.org/news-release/2022/us-supreme-court-overturns-roe-v-wade>.
14. <https://www.wsj.com/articles/where-abortion-is-legal-and-where-it-loses-protections-without-roe-v-wade-11656080346>.
15. <https://www.kff.org/womens-health-policy/slide/16-states-and-dc-have-state-laws-protecting-the-right-to-abortion-if-roe-v-wade-is-overturned/>.
16. <https://www.gutmacher.org/state-policy/explore/abortion-policy-absence-roe>.
17. <https://abcnews.go.com/US/missouri-maine-vermont-abortion-rights-victories/story?id=63629673>.
18. <https://ctmirror.org/2022/06/27/ct-will-become-a-safe-harbor-for-abortion-seekers-on-july-1-what-does-that-mean/>.
19. <https://www.usnews.com/news/national-news/articles/2022-05-19/out-of-state-bans-threaten-to-extend-the-reach-of-anti-abortion-america-but-some-states-are-preparing>.
20. <https://www.cbsnews.com/live-updates/biden-roe-v-wade-supreme-court-decision-dobbs/>.
21. <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-court-ruling-dobbs-v-jackson-women-s>.
22. <https://www.aha.org/special-bulletin/2022-06-24-special-bulletin-AHA-releases-statements-on-dobbs-v-jackson>.
23. <https://www.ama-assn.org/press-center/press-releases/ruling-egregious-allowance-government-intrusion-medicine>.
24. <https://www.aamc.org/news-insights/press-releases/aamc-statement-supreme-court-decision-dobbs-v-jackson-women-s-health-organization>.
25. <https://www.cms.gov/newsroom/press-releases/statement-cms-administrator-chiquita-brooks-lasure-access-reproductive-health-care>.
26. <https://www.facs.org/about-acf/statements/statement-on-supreme-court-decision-in-dobbs-v-jackson-women-s-health-case/>.
27. According to the Food and Drug Administration (FDA), mifepristone (mifeprex) is used with another medication called misoprostol to end a pregnancy less than 70 days developed.
28. <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-court-ruling-dobbs-v-jackson-women-s>.
29. <https://www.npr.org/2022/04/11/1091967163/abortion-rights-health-insurance-larry-hogan-maryland-veto-fetus>.
30. <https://www.gutmacher.org/evidence-you-can-use/medicaid-coverage-abortion>
31. <https://www.gutmacher.org/state-policy/explore/state-funding-abortion-under-medicaid>.
32. <https://www.kff.org/medicaid/state-indicator/abortion-under-medicaid/?currentTimeframe=0&sortModel=%7B%22coll%22:%22Location%22,%22sort%22:%22asc%22%7D>.
33. See *Connecticut Public Act 22-19* for an example of such law. <https://cga.ct.gov/2022/ACT/PA/PDF/2022PA-00019-R00HB-05414-PA.PDF>.
34. *Id.*
35. <https://www.kff.org/womens-health-policy/issue-brief/state-actions-to-protect-and-expand-access-to-abortion-services/>.
36. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
37. *Lawrence v. Texas*, 539 U.S. 558 (2003).
38. *Obergefell v. Hodges*, 576 U.S. 644 (2015).