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The Latest on Abortion: How the Supreme Court Has Jeopardized a Woman's Right to Choose

On December 1st, 2021, thousands gathered outside of the Supreme Court of the United States as the Justices prepared to hear arguments in what became known as “the most serious legal challenge to *Roe vs. Wade* in 30 years.”[1] *Dobbs v. Jackson Women's Health Organization*, unique for many reasons, “is the first case that the high court has taken in which a state is directly asking the Court to overturn the constitutional right to abortion.”[2] *Dobbs* “is seen by both sides as potentially pivotal in establishing how aggressively the court's new six-justice conservative majority will move to place new constraints on abortion rights.”[3] The issue, “a Mississippi law banning all abortions over 15 weeks gestational age except in medical emergencies and in the case of severe fetal abnormality.”[4] The question for the Court, “whether all pre-viability prohibitions on elective abortions are unconstitutional or not?”[5]

In 1973, the Supreme Court in *Roe v. Wade* “established the constitutional right to abortion before the pregnancy is considered to be viable, that is, can survive outside of a pregnant person's uterus.”[6] In 1992 the Court, in *Planned Parenthood v. Casey*, applying the doctrine of *stare decisis*, reaffirmed *Roe* and notably the constitutional right to abortion.[7] The Court asserted, “the right protected by *Roe* is a right to decide to terminate a pregnancy free of undue interference by the State.”[8] “A State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”[9]

Nonetheless, today, Mississippi, “is asking the Court to allow states to ban abortions at a point much earlier than the current viability standard established by *Roe v. Wade*.”[10] Rather than arguing that 15-weeks is when a fetus is considered viable, “Mississippi is asking the Supreme Court to either overturn the constitutional right to abortion or to allow states to ban some pre-viability abortions if it does not ‘burden a substantial number of women.’”[11] This comes after Jackson Women's Health Organization, the only abortion provider in Mississippi, challenged the law in federal court and both the US District Court for the Southern District of Mississippi and the 5th Circuit Court of Appeals struck down the law as unconstitutional.[12] Nevertheless, Mississippi still believes that *Roe* is outdated and that “the Court's viability standard...is unsatisfactory and does not allow the state to protect unborn life or maternal health.”[13] And “after nearly two hours of oral argument” the court's six-justice conservative majority seemed to agree.[14]

While the Justices have yet to render a decision, one thing seems clear—a woman's right to choose is now more than ever in jeopardy, and *Dobbs* “is an existential threat to *Roe*—even if the Court doesn't use the words ‘*Roe v. Wade* is overruled.’”[15] While the Supreme Court may decide to overturn *Roe*, likely resulting in 18 states immediately banning abortion,[16] the Court “could very well hand down a disingenuous decision that burns the constitutional right to an abortion to the ground, while also pretending to preserve some part of *Roe*.”[17] And,

even if the Court does decide to hold the Mississippi law unconstitutional, such doesn't change the fact that the Court "agreed to review an abortion ban that unquestionably violates nearly 50 years of Supreme Court precedent," signaling their willingness to now hear challenges to *Roe*.^[18] As the Supreme Court observed in reaffirming *Roe*, "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."^[19] All the while the availability of safe legal abortions "has dramatically improved women's health."^[20] Yet today, all that stands to change and those most vulnerable stand to lose the most.

[1] Adam Liptak, *Supreme Court to Hear Abortion Case Challenging Roe v. Wade*, *N.Y. Times* (May 17, 2021), <https://www.nytimes.com/2021/05/17/us/politics/supreme-court-roe-wade.html>.

[2] Laurie Sobel et al., *Abortion at SCOTUS: Dobbs v. Jackson Women's Health*, KFF (Nov. 2, 2021), <https://www.kff.org/womens-health-policy/issue-brief/abortion-at-scotus-dobbs-v-jackson-womens-health/>.

[3] Liptak, *supra* note 1.

[4] *Id.*

[5] Tori Staley and Jenny Guo, *Dobbs v. Jackson Women's Health Organization*, Legal Information Institute, Cornell U Law School, <https://www.law.cornell.edu/supct/cert/19-1392>.

[6] 410 U.S. 113 (1973); Sobel, *supra* note 2.

[7] 505 US 833, 879 (1992).

[8] *Id.* at 887.

[9] *Id.* at 879.

[10] Sobel, *supra* note 2.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Mark Walsh, "*Feelings run high*": Two hours of tense debate on an issue that divides the court and the country, SCOTUSblog (Dec. 1, 2021, 7:22 PM), <https://www.scotusblog.com/2021/12/feelings-run-high-two-hours-of-tense-debate-on-an-issue-that-divides-the-court-and-the-country/>.

[15] Ian Millhiser, *How the Supreme Court could overrule Roe v. Wade without overruling Roe v. Wade*, Vox (Nov. 29, 2021, 8:30 AM), <https://www.vox.com/2021/11/29/22796446/supreme-court-roe-wade-abortion-dobbs-jackson-womens-health-organization-overrule>.

[16] Sobel, *supra* note 2.

[17] Millhiser, *supra* note 16.

[18] Adam Liptak, *Supreme Court to Hear Abortion Case Challenging Roe v. Wade*, *N.Y. Times* (May 17, 2021), <https://www.nytimes.com/2021/05/17/us/politics/supreme-court-roe-wade.html>.

[19] *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 US 833, 835 (1992)

[20] *THE RIGHT TO CHOOSE AT 25: LOOKING BACK AND AHEAD*, ACLU, <https://www.aclu.org/other/right-choose-25-looking-back-and-ahead> (last visited Feb. 7, 2022).