

# Legal and Operational Challenges for Providers: Two Years after *Dobbs*

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## I. Introduction

Few areas of the law have changed as drastically and suddenly as the law surrounding abortion in late June 2022. While the relative breadth and permissiveness of the *Roe* ruling had been chipped away at by successive Supreme Court decisions for several decades, the legal availability of abortion in large swathes of the country (saying nothing about the practical availability of abortion services, which had eroded in many jurisdictions years earlier) was erased practically overnight by the Supreme Court's ruling in *Dobbs*. While a significant amount of political and media attention has been paid to the effect that the *Dobbs* ruling has had on women seeking abortions, comparatively less attention has been given to providers and the additional challenges they face.

This presentation attempts to summarize some of the relevant history surrounding the *Dobbs* ruling, as well as describing some more contemporary developments in the nearly two years immediately following. We focus particular attention on two cases brought in Texas after the *Dobbs* ruling and the effective date of Texas' trigger ban—both by a combination of women seeking abortion and their physicians (including Dr. Levison, one of our presenters). We then discuss the kinds of challenges that providers (and not just physicians or facilities providing abortion services) face in a post-*Dobbs* environment.

One note about this paper in comparison to the accompanying presentation. These are designed to function as inverse images of one another. While this paper gives more space to flesh out the history and background related to *Dobbs* and subsequent history (with special attention given to Texas), the live presentation gives less time and attention to that and focuses on those challenges that have arisen for providers in Texas (but which challenges are likely replicated elsewhere).

### A. **Pre-*Dobbs***

Prior to *Dobbs v. Jackson Women's Health Organization*<sup>1</sup> being decided in 2022, there were numerous monumental rulings that helped shaped the pre-*Dobbs* abortion framework in the United States. In 1973, the landmark decision of *Roe v. Wade* struck down Texas' criminal ban on abortion and held that the right to abortion is a "fundamental right."<sup>2</sup> In making this decision, the *Roe* Court held that the decision whether to end a pregnancy or not is fundamental to personal

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<sup>1</sup> *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

<sup>2</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

liberty.<sup>3</sup> The Court recognized “[t]he detriment that the State would impose upon . . . pregnant woman by denying this choice altogether is apparent.”<sup>4</sup> The *Roe* decision had two main parts that were noteworthy. First, before viability, it is the pregnant women’s decision whether to continue or terminate the pregnancy. State regulation protective of fetal life was only allowed after viability, as the Court believed that the state had both logical and biological justifications post-viability.<sup>5</sup> Second, *Roe* held that abortion restrictions must be held to meet strict scrutiny, which is the most stringent and restrictive level of constitutional review.<sup>6</sup>

Nineteen years after *Roe* was decided, the Supreme Court took up the case of *Planned Parenthood of Southeastern Pa. v. Casey* in 1992.<sup>7</sup> The case was brought in response to Pennsylvania statutes that were enacted, requiring (i) a woman seeking an abortion give her informed consent, (ii) a minor seeking an abortion obtain parental consent, (iii) that a married woman notify her husband of her intent to receive an abortion, and, (iv) that clinics provide certain information to a woman seeking an abortion and wait 24 hours before performing the abortion. While affirming portions of *Roe* relating to a women’s privacy rights under the Fourteenth Amendment, the *Casey* Court changed the scrutiny requirements imposed by *Roe*. The new scrutiny established by *Casey* was whether there was an “undue burden” placed by the statute – thus, a finding that “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”<sup>8</sup> In the end, the Court upheld all of the Pennsylvania statutes besides the spousal notification requirement.<sup>9</sup>

### **B. *Dobbs v. Jackson Women’s Health Organization***

In 2022, the highly controversial case of *Dobbs v. Jackson Women’s Health Organization* was decided by the Supreme Court.<sup>10</sup> This case was brought in response to Mississippi passing a law called the “Gestational Age Act,” which prohibited all abortions, with few exceptions, after 15 weeks’ gestational age.<sup>11</sup> Before *Dobbs*, the Court noted that the state of abortion legislation was such that some states had recently enacted laws allowing abortion, with few restrictions, at all stages of pregnancy, while other states had tightly restricted abortions beginning well before viability.<sup>12</sup> It was also noted that 26 States had expressly asked the Supreme Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions.<sup>13</sup>

In a divided opinion, the *Dobbs* Court upheld the Mississippi Act and overturned *Roe* and *Casey*, finding that the Constitution does not protect the right to an abortion, and also overturned

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<sup>3</sup> *Id.* at 153.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 163.

<sup>6</sup> *Id.* at 170.

<sup>7</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>8</sup> *Id.* at 877.

<sup>9</sup> *Id.* at 893—94

<sup>10</sup> *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022).

<sup>11</sup> *Id.* at 232.

<sup>12</sup> *Id.* at 230.

<sup>13</sup> *Id.*

the federal standards of abortion access which previously held that abortions were permitted up until fetal viability. In overruling *Roe* and *Casey*, the Court held that “[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment.”<sup>14</sup> The Court discussed the history of abortion in the United States at length, concluding that the right to abortion was not “deeply rooted in this Nation’s history and tradition” nor was “implicit in the concept of ordered liberty.”<sup>15</sup> The Court went on to criticize *Roe*, stating that “*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.”<sup>16</sup>

Now that the federal standards have been eliminated, the *Dobbs* Court ruled to allow the power to be returned to the individual states, thus allowing states to set policies regarding the legality of abortions and establish limitations – in the words of the Court, “[i]t is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”<sup>17</sup>

### C. Texas Abortion Statutes

In the wake of the *Dobbs* decision, there have been many changes to the Texas abortion statutes. In 2021 the Texas legislature passed House Bill (“HB”) 1280, which contained language that would ban abortion 30 days after one of the following events occurred (i) the issuance of a judgment by the United States Supreme Court overturning *Roe v. Wade*; (ii) the issuance of any other judgment by the United States Supreme Court giving the states the power to prohibit abortion; or (iii) the adoption of an amendment of the United States Constitution giving the power to prohibit abortion to the states.<sup>18</sup> Once the *Dobbs* decision was decided on June 24, 2022, Texas HB 1280 went into effect. Under HB 1280, the language of which can be found in Chapter 170A of the Texas Health & Safety Code, there are now civil and criminal punishments associated with performing abortions – it is a criminal felony, and civil fees can be imposed in an amount not less than \$100,000.<sup>19</sup>

Additionally, in September of 2021 Texas passed Senate Bill 8. This bill, which is also known as the Texas Heartbeat Act, prohibits abortions after six weeks of pregnancy (once a fetal heartbeat is detected). The law also criminalizes any person who “aids or abets” any such abortion and

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<sup>14</sup> *Id.* at 231.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 231—32.

<sup>17</sup> *Id.* at 232.

<sup>18</sup> Texas State Law Library, Abortion Trigger Laws, available at <https://guides.sll.texas.gov/abortion-laws/trigger-laws> (Last Updated Feb. 27, 2024).

<sup>19</sup> Tex. Health & Safety Code § 170A.004—.005; *see also* Texas Attorney General Ken Paxton, Updated Advisory on Texas Law Upon Reversal of *Roe v. Wade* (July 27, 2022). Similar so-called “trigger bans” were passed in several states around the country, written so as to be triggered automatically upon the Supreme Court’s reversal of *Roe*.

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First appeared as part of the conference materials for the  
35<sup>th</sup> Annual Health Law Conference session

"Legal and Operational Challenges for Providers: Two Years after *Dobbs*"