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# ***Dobbs v. Jackson Women's Health Organization: What's at Stake for Abortion Rights and Access***

*A current case before the U.S. Supreme Court, Dobbs v. Jackson Women's Health Organization, could completely decimate access to abortion and the legal right recognized by the courts for almost 50 years.*

## **In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court is considering a blatantly unconstitutional abortion ban**

In 2018, Mississippi passed an unconstitutional ban on abortion. The law bans abortion at 15 weeks of pregnancy,<sup>1</sup> well before fetal viability. The U.S. Supreme Court has said for almost 50 years—since *Roe v. Wade* in 1973—that a state cannot ban abortion prior to viability.<sup>2</sup>

The law was immediately challenged by providers at Jackson Women's Health Organization, the only abortion clinic left in Mississippi. A federal district court blocked the law,<sup>3</sup> a decision later affirmed by the Fifth Circuit Court of Appeals.<sup>4</sup> As the court acknowledged, "In an unbroken line dating to *Roe v. Wade*, the Supreme Court's abortion cases have established (and affirmed, and re-affirmed) a woman's right to choose an abortion before viability."<sup>5</sup>

In June 2020, Mississippi sought review by the U.S. Supreme Court.<sup>6</sup> There was no reason for the Court to hear the case,<sup>7</sup> but on May 17, 2021, after anti-abortion Justice Amy Coney Barrett joined the Court, the Court granted review. The case was heard on December 1, 2021, with a decision expected by summer 2022.

## **Mississippi is directly challenging the constitutional right to abortion, making outrageous and unsupported claims**

Mississippi is directly asking the Supreme Court to overturn *Roe v. Wade* and the 1992 case *Planned Parenthood v. Casey*, which reaffirmed *Roe*, calling them "egregiously wrong."<sup>8</sup> Mississippi's arguments—that the right to abortion "has no basis" in the text or structure of the Constitution or in the history or tradition of this country<sup>9</sup>—were thoroughly considered and rejected by the Supreme Court in both *Roe* and *Casey*. For close to 50 years, the Supreme Court has repeatedly affirmed that the legal right to abortion is firmly grounded in the Constitution's rights to liberty and equality.<sup>10</sup>

Mississippi argues that *Roe* and *Casey* are “irredeemably unworkable,”<sup>11</sup> claiming that judges have proven unable to apply the constitutional standard, and that state legislatures should be the ones to decide whether there is a right to abortion.<sup>12</sup> But as the Supreme Court already held, *Roe* “has in no sense proven unworkable.”<sup>13</sup> And, federal courts have uniformly struck down pre-viability bans on abortion,<sup>14</sup> because the standard is clear. It is anti-abortion legislators passing pre-viability abortion bans who are attempting to create unworkability where there is none.

Mississippi also claims that the right to abortion is no longer necessary thanks to advances in gender equality, including developments in contraception and laws offering paid leave and protecting against pregnancy discrimination.<sup>15</sup> This argument is cold comfort to those living in Mississippi, which utterly fails to provide the support that pregnant and parenting people need to thrive. Among other abysmal characteristics, Mississippi is the only state without an equal pay law, does not have laws ensuring people receive paid family leave or reasonable workplace accommodations for pregnancy, and has some of the most striking gender disparities in both economic and health outcomes.<sup>16</sup> Beyond Mississippi, existing laws promoting gender equality have not eradicated gender disparities, nor do they remove the substantial economic, educational, and professional burdens of being forced to continue a pregnancy.<sup>17</sup>

Rather, as the Court itself has recognized, “[t]he 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.”<sup>18</sup> That remains as true today as it was 30 years ago, with decades of research and lived experiences as evidence of that basic fact.<sup>19</sup>

## Losing the right to abortion would have immediate and devastating consequences for people in Mississippi and nationwide

If the Court were to overturn *Roe*, it would take away a fundamental right, upending 50 years of precedent, and leave decisions on abortion to politicians at the state and federal level. About half of the states would ban abortion if *Roe* was overturned.<sup>20</sup> An anti-abortion Congress and President could also pass a nationwide ban on abortion.

Bans on abortion care most affect families living in poverty, who are overwhelmingly people of color.<sup>21</sup> This would widen the class and race divide that already exists for many families. While wealthy families could still travel to states

that protect abortion care, low-income families would be faced with an impossible choice between supporting the families they already have or accessing essential, time-sensitive care. For example, if *Roe* were to fall, the average driving distance for Mississippians would increase from 67 miles to 495 miles one-way to the nearest state without a ban on abortion.<sup>22</sup> That would simply be an insurmountable barrier for many pregnant Mississippians. These burdens would fall hardest on Black women, who represent 72% of those who obtain abortion care in Mississippi and are also overrepresented in the low-wage workforce and more likely to be the primary breadwinner in their families.<sup>23</sup>

In many cases, individuals would be forced to carry an unwanted pregnancy to term, creating long-term consequences. Compared to people who obtained abortion care, those that were denied and subsequently gave birth experienced an increase in household poverty lasting at least four years.<sup>24</sup> And that dire situation would be replicated across the country in states that ban abortion.

## The Court could formally uphold *Roe v. Wade* but still devastate abortion access

The Court does not have to overturn *Roe v. Wade* in order to decimate people’s ability to access abortion care. The Court could formally uphold *Roe*, but allow Mississippi’s 15-week abortion ban to stand. Of course, this would be a legal fiction—the right to abortion before viability is the central holding of *Roe v. Wade*.<sup>25</sup>

Allowing a 15-week abortion ban in Mississippi would compound the other barriers people seeking abortion in Mississippi already face. Mississippi lawmakers have spent decades enacting a multitude of abortion restrictions, culminating in severe obstacles to abortion care. To obtain an abortion, patients must receive medically inaccurate counseling 24 hours prior to obtaining the abortion, requiring at least two trips to the provider’s office,<sup>26</sup> which means people have to travel, arrange child care, and miss work twice, incurring the accompanying logistical and financial barriers. Mississippi creates additional financial hardship by prohibiting public and private insurance plans from covering abortion, leaving people to pay-out-of-pocket for the health care they need.<sup>27</sup> Mississippi bans the use of telemedicine for medication abortion<sup>28</sup> and requires people seeking abortion care to undergo a medically unnecessary ultrasound.<sup>29</sup> Minors in the state must obtain consent from both parents or apply for permission from a judge, even in cases of rape or incest.<sup>30</sup> Mississippi law also bans abortion based on the reason for having an abortion<sup>31</sup> and disallows

the use of a medically indicated abortion procedure.<sup>32</sup> All of these restrictions operating together already put abortion care out of reach for many, especially for those who are already marginalized, but adding a 15-week ban would only exacerbate the harm. It would make *Roe v. Wade* an empty promise, even if it was not formally overturned.

The Supreme Court upholding Mississippi's 15-week ban would open the floodgates, both to other states adopting 15-week bans, and to states testing the limit, enacting earlier and earlier bans on abortion. Already, lawmakers hostile to abortion rights have been emboldened by the Supreme Court refusing to block Texas's ban on abortion at 6 weeks of pregnancy.<sup>33</sup> The devastation happening in Texas, and the effects felt in other states across the country because of that pre-viability ban, are a stark demonstration of what would happen if the Court upholds Mississippi's law.<sup>34</sup>

## This case is the culmination of a long-standing campaign to end abortion

*Dobbs v. Jackson Women's Health Organization* is the culmination of a decades-long coordinated attack on the right to abortion and people's ability to access it. Since *Roe*, hostile state legislatures have enacted more than 1,336 abortion restrictions and bans, with 44% of these restrictions enacted in the last decade alone.<sup>35</sup> The attack has escalated since Amy Coney Barrett's confirmation to the Supreme Court, with 108 abortion restrictions—the most of any year—passed in 2021.<sup>36</sup> Anti-abortion extremists believe their goal of ending the legal right to abortion is within reach. Indeed, after Justice Barrett joined the Court, Mississippi became bolder in its arguments—changing the case from a challenge to the viability line to instead a full-throated argument for a holding that the Constitution does not protect the right to abortion.<sup>37</sup> And as outrageous as Mississippi's legal arguments are, they appeared to gain traction among a number of the Justices during oral argument. If those arguments hold—and if the Court does anything less than reaffirm the right to abortion and strike down Mississippi's ban—it will be to the lasting detriment of our Constitution, integrity of the Court, and people's health, lives, and futures for generations to come.

- 1 Miss. Code § 41-41-191 (2018).
- 2 Nat'l Women's Law Ctr., *Roe v. Wade and the Right to Abortion*, <https://nwl.org/resources/roe-v-wade-and-the-right-to-abortion/> (Jan. 2022).
- 3 *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536 (S.D. Miss. 2018).
- 4 *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019).
- 5 *Id.* at 269.
- 6 Pet. for Cert., *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (S. Ct. docketed June 15, 2020).
- 7 The Court does not take most cases, and review is usually only granted when there is disagreement among federal courts or when an important question of federal law has not been considered by the Court. None of these circumstances apply here.
- 8 Pet'rs Br., *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (July 22, 2021), 1 [hereinafter Mississippi's 2021 brief].
- 9 *Id.* at 14-15.
- 10 Br. of Amici Curiae Nat'l Women's Law Ctr., et. al., *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S.) (Sep. 20, 2021) [hereinafter NWLC brief], 2-3, <https://nwl.org/resource/nwlc-files-amicus-brief-on-behalf-of-72-organizations-in-supreme-court-case-deciding-the-future-of-the-right-to-abortion-2/>; Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. at 846, 856-7 (1992); *Roe v. Wade*, 410 U.S. 113, 152-155 (1973).
- 11 Mississippi's 2021 brief, *supra* note 8, at 22.
- 12 *Id.* at 2-3; 19-22.
- 13 *Casey* 505 U.S. at 855.
- 14 See, e.g., *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (invalidating 6-week ban under "Supreme Court precedent holding that states may not prohibit pre-viability abortions"); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (similar, invalidating 12-week abortion ban); *Isaacson v. Horne*, 716 F.3d 1213, 1231 (9th Cir. 2013) (similar, invalidating 20-week abortion ban).
- 15 Mississippi's 2021 brief, *supra* note 8, at 29, 34-35.
- 16 NWLC brief, *supra* note 10, at 32-36.
- 17 *Id.* at 15-31.
- 18 *Casey*, 505 U.S. at 856.
- 19 For example, access to abortion has increased school graduation and employment rates for women, and especially Black women. Anna Bernstein & Kelly M. Jones, CTR. ON THE ECON. OF REPROD. HEALTH, THE ECONOMIC EFFECTS OF ABORTION ACCESS: A REVIEW OF THE EVIDENCE (2019), [https://iwr.org/wp-content/uploads/2020/07/B379\\_Abortion-Access\\_final.pdf](https://iwr.org/wp-content/uploads/2020/07/B379_Abortion-Access_final.pdf). Pregnant individuals who are able to obtain an abortion today are less likely to experience economic hardship and insecurity than those who are denied an abortion. Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH 407, 412 (2018). See generally, Br. of Amici Curiae Advocates for Youth Inc. and Neo Philanthropy, Inc. d/b/a We Testify, *Dobbs v. Jackson Women's Health*, No. 19-1394 (U.S.) (Sep. 17, 2021), <https://www.advocatesforyouth.org/wp-content/uploads/2021/09/WeTestify-Main-EFILE-Sep-17-21.pdf>.
- 20 21 states already have bans that would become enforceable as soon as *Roe* is overturned, and an additional five states are politically and historically hostile to abortion rights and likely to act in the absence of the federal protections provided by *Roe v. Wade*. Elizabeth Nash & Lauren Cross, GUTTMACHER INSTITUTE, *26 States Are Certain or Likely to Ban Abortion Without Roe: Here's Which Ones and Why* (October 2021), <https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why>.
- 21 See, e.g., Amanda J. Stevenson, 58 DEMOGRAPHY 2019, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, <https://doi.org/10.1215/00703370-9585908> (estimating that Black women would experience the greatest burden of increased mortality if abortions were denied); Richard v. Reeves & Joanna Venator, BROOKINGS INST., *Sex, contraception, or abortion? Explaining class gaps in unintended childbearing* (Feb. 26, 2015), <https://www.brookings.edu/research/sex-contraception-or-abortion-explaining-class-gaps-in-unintended-childbearing/>.
- 22 GUTTMACHER INST., *If Roe v. Wade Falls: Travel Distance for People Seeking Abortion*, <https://states.guttmacher.org/#mississippi> (last visited Jan. 20, 2022).
- 23 NWLC brief, *supra* note 10, at 35-36.
- 24 Diana Greene Foster, et al., 108 (3) AM. J. OF PUB. HEALTH 407-413, *Socioeconomic outcomes of women who receive and women who are denied wanted abortions* (2018), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2017.304247>.
- 25 *Roe v. Wade and the Right to Abortion*, *supra* note 2.
- 26 MISS. CODE ANN. §§ 41-41-33, -35 (Enacted 1991; Last Amended 1996).
- 27 Mississippi prohibits insurance coverage of abortion in the insurance plans offered through the ACA marketplaces, for all state employees, and for individuals qualified for the state Medicaid program. MISS. CODE ANN. §§ 41-41-97, -99 (Enacted 2010); Miss. Code Ann. § 41-41-91 (Enacted 2002); Miss. CODE ANN. § 41-41-91 (Enacted 2002); Miss. Div. of Medicaid, *Provider Policy Manual*, § 53.08 (Sept. 1, 2002), at <https://www.medicaid.ms.gov/wp-content/uploads/2014/01/Admin-Code-Part-202.pdf>.
- 28 MISS. CODE ANN. §§ 41-41-107.
- 29 MISS. CODE ANN. §§ 41-41-34.
- 30 MISS. CODE ANN. §§ 41-41-31 (Enacted 1991), 51, -53, -57 (Enacted 1986), -55 (Enacted 1986; Last Amended 2007).
- 31 Miss. H.B. 1295, Reg. Sess. 2020 (as enrolled).
- 32 MISS. CODE ANN. § 41-41-155.
- 33 *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021).
- 34 Robert K. Jones et al., GUTTMACHER INST., *New Evidence: Texas Residents Have Obtained Abortions in at Least 12 States That Do Not Border Texas* (Nov. 2021), <https://www.guttmacher.org/article/2021/11/new-evidence-texas-residents-have-obtained-abortions-least-12-states-do-not-border>.
- 35 GGUTTMACHER INST., *For the First Time Ever, U.S. States Enacted More Than 100 Abortion Restrictions in a Single Year* (October 2021), <https://www.guttmacher.org/article/2021/10/first-time-ever-us-states-enacted-more-100-abortion-restrictions-single-year>.
- 36 Elizabeth Nash, GUTTMACHER INST., *State Policy Trends 2021: The Worst Year for Abortion Rights in Almost Half a Century* (December 31, 2021), <https://www.guttmacher.org/article/2021/12/state-policy-trends-2021-worst-year-abortion-rights-almost-half-century>.
- 37 Pet. for Cert., *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (June 14, 2020), Pet'rs Br., *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (July 22, 2021).