

## Government Controversies and Public Policy Litigation

# SCOTUS Overrules *Roe v. Wade*:

## Part II: Outlining the Threat to Reproductive Rights Across the United States

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On June 24, 2022, the Supreme Court issued its [opinion](#) in *Dobbs v. Jackson Women's Health Organization*. Authored by Justice Alito, the decision held that the Constitution does not grant a right to abortion (5-4), overturning the landmark decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>[1]</sup> In the absence of a federal constitutional right to abortion, abortion procedures and medication will be governed only by the laws of each state.

This alert outlines the status of abortion access across the United States. In [Part I](#) of this alert, we assess the role that businesses will play in this changing legal environment, the risks they may face, and some of the steps they can take to protect access to and the privacy of individuals seeking reproductive health care in America.

### I. The Status of Abortion Access Across the Country

In the absence of federal constitutional protection, abortion access now varies widely across the United States. As of June 26, 2022, access to abortion is significantly limited in 21 states, including several states that had pre-*Roe* bans that are once again effective and 13 states that had “trigger laws” that took effect upon the overturning of *Roe*. Notably, this is a quickly changing landscape, as states react to *Dobbs* with different speeds.

Trigger laws, which were passed in anticipation of *Roe*'s reversal, ban abortion contingent on a constitutional amendment or Supreme Court ruling. The *Dobbs* decision now “triggers” these laws in 13 states. In three states,<sup>[2]</sup> these laws took effect immediately following the *Dobbs* decision on June 24, 2022. In seven other states,<sup>[3]</sup> trigger laws require certification from the state legislature or attorney general before going into effect. By day's end on June 24, 2022, state officials in four states<sup>[4]</sup> had already [completed](#) this certification. In three states,<sup>[5]</sup> the [certifications](#) are in motion, but not yet complete. In three other states,<sup>[6]</sup> trigger laws will become active thirty days after the Court issues its final (not slip) opinion. Idaho's attorney general, a state with a thirty-day certification, [anticipates](#) that the thirty-day mark will fall in August.

In addition to the trigger laws, some states<sup>[7]</sup> had abortion bans in place in 1973 that were invalidated under *Roe* but never repealed. These laws now presumably have new life and further ban abortions in those states (although in some states, such as Michigan, Democratic governors and state attorneys general have announced that they will not enforce these bans). Other states<sup>[8]</sup> had more modern bans, passed in defiance of *Roe*, that were enjoined by courts; these bans are either in effect or likely will be soon when the injunctions are overturned. Several more are [expected](#) to enact bans soon.<sup>[9]</sup>

In 20 states and the District of Columbia, abortion access is expected to remain accessible.<sup>[10]</sup> In about half of those states, access to abortion has been [expanded](#) in some way. For example, in Maryland, new laws have expanded patient access to providers and insurance coverage of abortions.<sup>[11]</sup> In

several states, including California, new laws make the state a “sanctuary” for those seeking abortion in the state—attempting to provide legal protections to those who seek abortion care, provide abortions or “aid and abet” individuals traveling to the state for abortions.<sup>[12]</sup>

Several news outlets, including [The New York Times](#), and [POLITICO](#), have posted resources tracking the state of play in each state for those seeking to keep up with the evolving status of abortion access in the various states.

## II. Variations Among State Bans

Although the state bans fall into several different categories, they vary in certain pertinent ways:

- **Liability.** While some state laws that criminalize abortion specifically target medical providers,<sup>[13]</sup> most aim liability broadly at “any person,” “every person,” or “a person” who performs, attempts to perform, induces, or attempts to induce an abortion through a medical procedure or the provision of medication.<sup>[14]</sup> Those who assist in any of the aforementioned activities may be liable as “aiders and abettors.”<sup>[15]</sup>
- **Scope of Abortion Bans – Surgical v. Medication Abortions.**<sup>[16]</sup> Medication abortions are increasingly common and account for more than half of all abortions in the United States.<sup>[17]</sup> Generally speaking, proponents of state restrictions on abortions that do not distinguish between surgical and medication abortions are expected to argue that their restrictions prohibit both. The decreased availability of surgical abortions in states with abortion bans may make abortion pills, which can be prescribed by telemedicine and transmitted by mail, more prevalent.<sup>[18]</sup> However, some states have enacted laws that provide for heightened criminal liability for those who provide patients with medication to induce abortion. For example, the Governor of Louisiana signed a bill on June 22, 2022 that makes “delivering, dispensing, distributing or providing” an “abortion-inducing drug[]” a crime with a penalty of up to five years in prison and up to a \$50,000 fine, effectively banning abortions by mail.<sup>[19]</sup> On Friday, June 24, 2022 Attorney General Merrick Garland took a shot across the bow to discourage states from enacting such laws, [arguing](#) that medication abortion is in the purview of the federal government and that states “may not ban Mifepristone based on disagreement with the FDA’s expert judgment about safety and efficacy.” Generally, the federal government has jurisdiction over prescription medicine, but states have jurisdiction over the practice of medicine. Thus, this fight is expected to head to the courts as those fighting for access to abortion work to make such medication available to women across the country and those seeking to ban abortion work to make it an illegal practice of medicine in states with restrictions on abortion.
- **Enforcement.** State laws vary in their enforcement mechanism. While most states’ laws create only criminal penalties for abortions performed in violation of the statute, the bans in six states<sup>[20]</sup> include civil causes of action, which grant private individuals and state attorneys general standing to sue different categories of individuals.<sup>[21]</sup> Civil cases as well as prosecutions are expected in Texas and Oklahoma. Although Idaho, Louisiana, Ohio, and North Dakota also have civil provisions, civil cases are less likely to arise in those states because Idaho’s civil law is superseded by its criminal provision when activated, and Louisiana and Ohio grant standing to sue only to the woman on whom the abortion was performed. Similarly, civil cases may be less likely in North Dakota where state law grants a right of action only to close family of the “unborn child” and law enforcement officers.
- **Travel Bans.** Some states may seek to expand the reach of their statutes to target abortions that occur out-of-state. For example, a bill introduced in Missouri would allow citizens to sue individuals who help a Missouri resident obtain an abortion out-of-state. Other states may take retaliatory action to punish those who assist women to travel to another state. For instance, Texas lawmakers have [pledged](#) to introduce bills barring corporations from doing business in Texas if they pay for abortions in states where the procedure is legal; a Texas lawmaker already [indicated](#) that he

believed a company paying for their employees to seek abortions out-of-state violated the state's criminal ban.

While state laws prohibiting travel to other states to obtain a legal abortion were not under review by the *Dobbs* Court, it did not stop the justices from speculating on the issue. Justice Kavanaugh in his concurring opinion posited the question, “[M]ay a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.”<sup>[22]</sup> The dissent in *Dobbs* predicts that such laws may multiply, writing: “After this decision, some States may block women from traveling out of State to obtain abortions, or even from receiving abortion medications from out of State. Some may criminalize efforts, including the provision of information or funding, to help women gain access to other States’ abortion services.”<sup>[23]</sup>

The issues involved in interstate travel, interstate commerce, and the recognition of state laws by other states in the context of these abortion laws are unsettled. But next term, the Court is scheduled to hear a major dormant commerce clause case—*National Pork Producers Council v. Ross*<sup>[24]</sup>—that could have an impact on the question of whether one state can forbid a citizen of that state from traveling and receiving a legal abortion in another state. Although the case is not about abortion specifically, the Supreme Court’s decision in the case could impact the ability of states to regulate conduct wholly outside their borders.<sup>[25]</sup>

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[1] *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022).

[2] Kentucky, Louisiana, and South Dakota.

[3] Arkansas, Mississippi, Missouri, North Dakota, Oklahoma, Utah, and Wyoming.

[4] Arkansas, Missouri, Oklahoma, and Utah.

[5] Mississippi, North Dakota, and Wyoming.

[6] Idaho, Tennessee, and Texas. Texas also has a pre-*Roe* ban that Texas Attorney General Kenneth Paxton [indicated](#) is immediately in effect.

[7] These states include Alabama, Arizona, Michigan, North Carolina, West Virginia, and Wisconsin.

[8] These states include Alabama, Georgia, Ohio,

[9] These states include Indiana, Kansas, Montana, and Nebraska.

[10] Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington. See *How State Abortion Laws Could Change if Roe is Overturned*, N.Y. Times (June 3, 2022), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html>.

[11] Md. H.B. 937 (2022).

[12] Cal. A.B. 1666 (2022).

[13] Fla. Stat. § 390.0111; Ga. Code Ann. § 16-12-141; N.D. Code § 14-02.7-05; Ohio R.C. § 2919.195, Utah Code Ann. §§ 76-7a-101, 76-7a-201; W. Va. Code, § 61-2-8; Wyo. Code § 35-6-101 *et seq.*

[14] See, e.g., Ala. H.B. 314 § 4 (2019); Ark. Code Ann. § 5-61-404(a); Okla. Stat. tit. 21, § 861; S.D. Code § 22-71-51.

[15] Several laws specifically immunize pregnant women who obtain or attempt to obtain abortions from liability. See Ala. H.B. 314 § 5 (2019), Ariz. S.B. 1164 (2022), Ark. Code Ann. § 5-61-404(c)(1), Idaho Code § 18-622(5), Ky. H.B. 148, La. Stat. Ann. § 40:1061(H), Miss. S.B. 2391, Mo. Rev. Stat. § 188.017(2), Tenn. Code Ann. § 39-15-216(f); Tex. Health & Safety Code §§ 170A.003, 171.206(b). South Carolina and Wyoming's laws are distinctive in specifically imposing liability on the pregnant individual. See S.C. Code § 44-41-80(b) (providing that a person who solicits abortion medication or submits to a surgical abortion, unless necessary to save her life, is guilty of a misdemeanor punishable by imprisonment of up to two years or a fine of up to \$1,000); Wyo. Stat. Ann. § 35-6-101 *et seq.* (criminalizing "an act, procedure, device or prescription administered to or prescribed for a pregnant woman by any person with knowledge of the pregnancy, including the pregnant woman herself, with the intent of producing" the premature end of the pregnancy).

[16] "Medication abortions" is a term used to describe an abortion induced by approved and prescribed medication. The FDA has approved such drugs, allowing a pregnant patient to take a drug called mifepristone, RU-486, followed by a second drug called misoprostol, to end a pregnancy rather than have a surgical procedure. The FDA regulates these drugs and now allows patients to consult with healthcare providers via telemedicine and receive the pills by mail. These drugs are approved for use through the 10th week of pregnancy. See Ahmed Aboulenein, *Analysis: Abortion pills over the counter? Experts see big hurdles in widening U.S. access*, REUTERS (June 24, 2022), <https://www.reuters.com/business/healthcare-pharmaceuticals/abortion-pills-over-counter-experts-see-major-hurdles-widening-us-access-2022-06-23/>.

[17] Rachel K. Jones et al., *Medication Abortion Now Accounts for More Than Half of All US Abortions*, Guttmacher Institute (Feb. 24, 2022, updated Mar. 2, 2022), <https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions>. The Guttmacher Institute's February 2022 analysis of the increasing prevalence of medication abortion observed the "potential legal risk to patients, providers and anyone who assists someone in obtaining a medication abortion in states where it may be banned or criminalized" and "[a]ctions that pose a risk for prosecution could include obtaining pills through alternative channels, such as online providers and clinics across state lines." *Id.*

[18] The cost of abortion pills relative to the cost of surgical abortion depends on the stage of the pregnancy and the pregnant individual's location. According to the Guttmacher Institute, the average cost of an abortion, whether surgical or medical, at 10 weeks of pregnancy was slightly more than \$500. The median cost at 20 weeks was \$1,195. Patients often must pay out of pocket for additional nonmedical costs, such as transportation, child care, and lodging. *Medicaid Coverage of Abortion*, Guttmacher Institute (Feb. 2021), <https://www.guttmacher.org/evidence-you-can-use/medicaid-coverage-abortion>; see also *Insurance Coverage*, Guttmacher Institute, <https://www.guttmacher.org/united-states/abortion/insurance-coverage> (average cost of an early medication abortion is \$504).

[19] La. S.B. 388 (2022); see also Piper Hutchinson, *Abortion medication by mail banned in Louisiana*, LA. ILLUMINATOR (June 22, 2022), <https://lailluminator.com/briefs/abortion-medication-by-mail-banned-in-louisiana/>.

[20] Idaho, Louisiana, North Dakota, Ohio, Oklahoma, and Texas.

[21] Idaho S.B. 1309; La. Stat. Ann. § 40:1061.29; N.D. H.B. 1466, § 14-02.7-07 (2007); Ohio S.B. 23 (H); Okla. H.B. No. 4327; Tex. Health & Safety Code § 171.208(a)(1)–(3).

[22] *Dobbs*, 2022 WL 2276808, at \*65 (Kavanaugh, J., concurring).

[23] *Dobbs*, 2022 WL 2276808, at \*72 (Breyer, J., Kagan, J., & Sotomayor, J., dissenting).

[24] No. 21-468 (2022).

[25] The case concerns a California law forbidding the sale of pork in California unless the hog was raised according to specific animal welfare standards. The National Pork Producers are arguing that this state law violates the extraterritoriality doctrine of the Dormant Commerce Clause because California is essentially setting a national standard for how hogs are raised. The Ninth Circuit disagreed

and held that the law was a permissible regulation of in-state commerce and was dismissive of the extraterritorial rule. If the Supreme Court upholds the Ninth Circuit's decision and undermines the extraterritorial rules, states regulating conduct wholly outside their borders (e.g., having an abortion in another state) could be permissible.

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