Americans United for Life

DEBRIEF OF THE SUPREME COURT ORAL ARGUMENT IN *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION*

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Introduction

The Supreme Court heard oral argument in *Dobbs v. Jackson Women's Health Organization* on December 1, 2021.[1] The case is primed to overrule *Roe v. Wade*[2] and nearly fifty years of federal constitutional travesty that manufactured a woman's right to abort her unborn child. As Mississippi Solicitor General Scott Stewart poignantly argued before the Supreme Court,

> Roe versus Wade and Planned Parenthood versus Casey haunt our country. They have no basis in the Constitution. They have no home in our history or traditions. They've damaged the democratic process. They've poisoned the law. They've choked off compromise. For 50 years, they've kept this Court at the center of a political battle that it can never resolve. And 50 years on, they stand alone. Nowhere else does this Court recognize a right to end a human life.[3]

Background

The Supreme Court first recognized the "right of privacy…is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" in *Roe v. Wade* in 1973.[4] In 1992 in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court clarified that abortion is a substantive due process right and reaffirmed the right to a pre-viability abortion "is the most central principle of *Roe v. Wade*."[5] Accordingly, the Supreme Court crafted the undue burden standard to

[1] No. 19-1392, SCOTUS Docket (Dec. 1, 2021).
[2] 410 U.S. 113 (1973).
[3] Transcript of Oral Argument at 4, Dobbs v. Jackson Women's Health Org., No. 19-1392 (Dec. 1, 2021).
[4] Roe, 410 U.S. at 153.
[5] 505 U.S. 833, 871 (1992).

analyze the constitutionality of abortion regulations. The test is a "shorthand for the conclusion 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."[6]

Dobbs challenges *Casey*'s undue burden standard and *Roe*'s purported abortion right. The case concerns Mississippi's Gestational Age Act, which limits abortions after fifteen weeks gestation to medical emergencies and cases of severe fetal disability.[7] Both the district court and Fifth Circuit Court of Appeals held the Act was unconstitutional, acting as a ban on a woman's right to a pre-viability abortion.[8]

The case is now before the Supreme Court on the issue of "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional."[9] *Dobbs* not only implicates *Casey*'s undue burden standard, which relies upon an arbitrary viability line, but also *Roe*'s legitimacy in fabricating abortion as a constitutional right.

What the Parties Argued

Mississippi argued the Court should reverse *Roe* and *Casey* and return the abortion issue to the states. According to the State,

> The Constitution places its trust in the people. On hard issue after hard issue, the people make this country work. Abortion is a hard issue. It demands the best from all of us, not a judgment by just a few of us. When an issue affects everyone and when the Constitution does not take sides on it, it belongs to the people.[10]

In this regard, the Constitution is "scrupulously neutral" on the abortion issue.[11] Mississippi further discussed how women do not have the same reliance interests as they did in *Casey*. For example, safe haven laws[12] emerged in 1999 and are now ubiquitous in all states, relieving the burden of parenting.[13] Contraception also is more accessible and affordable than at the time of *Roe* or *Casey*.[14] Finally, the State also pointed out it took the Supreme Court fifty-eight years to decide that *Plessy v.*

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[6] *Id*. at 877.
[7] MISS. CODE § 41-41-191(4) (2018).
[8] Jackson Women's Health Org. v. Currier, 349 F. Supp. 536, 545 (S.D. Miss. 2018); Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 274 (5th Cir. 2019).
[9] Petition for a Writ of Certiorari at i, Dobbs v. Jackson Women's Health Org., No. 19-1392 (June 15, 2020).
[10] Transcript of Oral Argument, *supra* note 3, at 5.
[11] *Id*. at 111.
[12] Safe haven laws, also known as "infant relinquishment" or "Baby Moses laws," allows a parent to leave her newborn in a safe place in certain circumstances with certain individuals. *See*, *e.g.*, MISS. CODE § 43-15-201 to -209 (2020).
[13] Transcript of Oral Argument, *supra* note 3, at 112–113.
[14] *Id*.

Ferguson and "separate but equal" doctrine[15] was egregiously wrong. Roe similarly has inflicted nearly fifty years of "tremendous damage on our country and will continue to do so and take [in]numerable human lives unless and until this Court overrules it."[16]

Jackson Women's Health Organization, the abortion clinic, contended the Act is "flatly constitutional under decades of precedent."[17] According to the abortion clinic: (1) *stare decisis* presents "an especially high bar" for overruling *Roe*, and Mississippi has not passed this bar, (2) the Supreme Court correctly decided *Casey* and *Roe* in protecting a woman's liberty interest in abortion, and (3) under a social reliance theory, "eliminating or reducing the right to abortion will propel women backwards."[18]

The United States participated in oral argument as *amicus curiae* in support of the abortion clinic. According to the federal government, "That guarantee that the state cannot force a woman to carry a pregnancy to term and give birth has engendered substantial individual and societal reliance."[19] "If this Court renounces the liberty interests recognized in Roe and reaffirmed in Casey, it would be an unprecedented contraction of individual rights and a stark departure from principles of stare decisis."[20]

Questions the Justices Posed to the Parties

Dobbs presented the most comprehensive oral argument the Supreme Court has heard on abortion. The discussion touched upon the spectrum of abortion issues, including *stare decisis*, the undue burden standard's viability line, women's social reliance upon abortion, the distorted legal history of abortion, federalism, and the impact of safe haven laws. Here are some of the Justices' questions.

Chief Justice Roberts

Chief Justice Roberts delved into the legal concept of viability. The Chief Justice noted that Justice Blackmun, *Roe*'s author, indicated the viability line was dicta in his papers.[21] *Casey* nevertheless determined the viability line was the most central holding of *Roe*, largely "because [the viability line] was pretty much all that

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[15] 163 U.S. 537 (1896).
[16] Transcript of Oral Argument, *supra* note 3, at 112–113.
[17] *Id*. at 47.
[18] *Id*. at 47–48.
[19] *Id*. at 85.
[20] *Id*.
[21] *Id*. at 19, 68; *see* CLARKE D. FORSYTHE, ABUSE OF DISCRETION 125–153 (2013) (discussing the arbitrariness of the viability line and how it emerged as dicta in *Roe v. Wade*).

was left after [the Justices] were done dealing with the rest of [*Roe*]."[22] Similarly, the Chief Justice indicated that "as far as viability goes, I don't see what that has to do with the question of choice at all."[23] Although the United States contended the viability line was "both a logical and a biological justification that it marks the point in pregnancy when the fetus is capable of meaningful life," the Chief Justice rejected the argument.[24] Citing John Hart Ely, Chief Justice Roberts explains that the United States' argument "was a complete syllogism. That's the definition of viability. It's not a reason that viability is a good line."[25] Markedly, the Chief Justice indicated that a fifteen-week ban "[is] not a dramatic departure from viability. It is the standard that the vast majority of other countries have."[26] The Chief Justice noted that the United States shared the viability standard with the People's Republic of China and North Korea.[27]

During oral argument, the Chief Justice also asked some questions about *stare decisis*,[28] and proposed a "reasonable possibility standard," under which a statute would be constitutional if a woman had a "fair choice" or "opportunity" to choose abortion.[29]

Justice Thomas

Justice Thomas asked probing questions about where the purported abortion right appears in the Constitution.[30] He questioned whether it made a difference "that this is the only constitutional right that involves the taking of a life."[31] The abortion clinic contended abortion rights emerge from Fourteenth Amendment substantive due process under Supreme Court precedent recognizing the rights to make family decisions and physical autonomy.[32] Justice Thomas, however, noted those cases emerged from *Lochner v. New York*, a case heavily criticized and later overruled by the Supreme Court.[33]

Justice Thomas asked Mississippi what standard the Court should adopt other than the viability line if *Roe* and *Casey* are not overruled. Mississippi replied that the

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[22] Transcript of Oral Argument, *supra* note 3, at 20, 68.
[23] *Id*. at 101.
[24] *Id*. at 101–102.
[25] *Id*. at 102.
[26] *Id*. at 54.
[27] *Id*.
[28] *Id*. at 40, 67.
[29] *Id*. at 53.
[30] *Id*. at 6-7, 49, 85–86.
[31] *Id*. at 7.
[32] *Id*. at 72.
[33] *Id*.; *see* Lochner v. New York, 198 U.S. 45 (1905).

Supreme Court should then adopt "a clarified version of the undue burden standard…untethered from any bright-line viability rule."[34]

Justice Thomas also posed a hypothetical question about *Ferguson v. Charleston*, in which South Carolina had convicted a woman of criminal child neglect after she had ingested cocaine during a post-viability pregnancy.[35] He asked whether the state would have the same interest if the circumstances had occurred in a pre-viability abortion. Both the abortion clinic and United States responded by referring to a woman's liberty interest in obtaining a pre-viability abortion.[36]

Justice Breyer

Justice Breyer emphasized *stare decisis* during oral argument.[37] He questioned whether this case should rise to the level of a "watershed case" that overruled a strong, politically divisive precedent.[38] Justice Breyer expressed concerns that overruling *Roe* would hurt the political perception of the Supreme Court. Referencing *Casey*, Justice Breyer explained:

> To overrule under fire in the absence of the most compelling reason, to reexamine a watershed decision, would subvert the Court's legitimacy beyond any serious question…overruling unnecessarily and under pressure would lead to condemnation, the Court's loss of confidence in the judiciary, the ability of the Court to exercise the judicial power and to function as the Supreme Court of a nation dedicated to the rule of law.[39]

Justice Alito

Justice Alito explored the legal history of abortion, questioning whether the Court can say that "abortion is deeply rooted in the history and traditions of the American people."[40] Justice Alito also clarified the abortion clinic presented a zero sum game with "no half-measures" and, under the abortion clinic's position, the Court must reaffirm *Roe* and *Casey* or overrule them in their entirety.[41] The Justice questioned whether women have the same interest pre- and post-viability.[42] He noted

[34] Transcript of Oral Argument, *supra* note 3, at 7–8.
[35] *Id*. at 49, 103; *see* Ferguson v. City of Charleston, 532 U.S. 67 (2001).
[36] Transcript of Oral Argument, *supra* note 3, at 49–51, 103–104.
[37] *Id*. at 8–11.
[38] *Id*. at 25–26, 70, 89–90.
[39] *Id*. at 10; *see* Casey, 505 U.S. at 867.
[40] Transcript of Oral Argument, *supra* note 3, at 73–76.
[41] *Id*. at 63.
[42] *Id*. at 64–65.

"viability is dependent on medical technology and medical practice. It has changed. It may continue to change."[43]

The Justice also questioned the United States about reliance theories in egregiously wrong decisions. In *Plessy v. Ferguson*, for example, "the south built up a whole society based on the idea of white supremacy. So there was a lot of reliance. It was…improper reliance. It was reliance on an egregiously wrong understanding of what equal protection means."[44] In response to Justice Alito's questioning, the United States ultimately conceded that, under the United States' absolute position on an abortion viability line, the Supreme Court would not have overruled *Plessy*'s egregious holding of "separate but equal" if the Court reheard the case a year after the initial decision.[45]

Justice Sotomayor

Justice Sotomayor expressed concerned about the "public perception that the Constitution and its reading are just political acts."[46] Overruling *Roe* and *Casey* would call into question other substantive due process cases, such as *Griswold v. Connecticut*, *Lawrence v. Texas*, and *Obergefell v. Hodges*.[47] Justice Sotomayor also noted that even though the Constitution does not enumerate an abortion right, other principles also do not explicitly appear in the Constitution.[48]

Although Mississippi argued *Casey* has not accounted for advancements in fetal medicine over the past thirty years, including the medical understanding of fetal pain, Justice Sotomayor rejected this argument. According to the Justice, the *Daubert* standard would not admit evidence of fetal pain.[49] Justice Sotomayor also compared fetal pain to brain-dead individuals whose bodies may respond to external stimuli.[50] The Justice further questioned Mississippi, asking "How is your interest [in prenatal life] anything but a religious view?"[51]

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[43] *Id*. at 66.
[44] *Id*. at 94.
[45] *Id*. at 91–95.
[46] *Id*. at 15.
[47] *Id*. at 27; *see* Griswold v. Connecticut, 381 U.S. 479 (1965); Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).
[48] For example, Justice Sotomayor cites the judicial supremacy principle from *Marbury v. Madison*, 5 U.S. 137 (1803), characterizing it as "the Supreme Court[] is the last word on what the Constitution means." Transcript of Oral Argument, *supra* note 3, at 22. Federalists may find fault with this characterization, viewing the Supreme Court not as the final authority on the Constitution, but rather, the final arbiter of its meaning in specific cases.
[49] Transcript of Oral Argument, *supra* note 3, at 17; *see* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).
[50] *Id*. at 21.
[51] *Id*. at 29.

Justice Kagan

Justice Kagan discussed *stare decisis* and how the doctrine "prevent[s] people from thinking this Court is a political institution that will go back and forth depending on what part of the public yells loudest and…prevent[s] people from thinking that the Court will go back and forth depending on changes to the Court's membership."[52] The Justice noted for nearly fifty years, *Roe* and *Casey* have struck a balance between a woman's interest in bodily autonomy and the state's interest in protecting prenatal life.[53] She also examined a woman's reliance interest and how abortion acted as a backup to contraceptive failure.[54]

Justice Kagan, however, appeared open to compromise, questioning whether the Court could take an intermediate position by discarding the viability line, but retaining *Casey*'s undue burden standard.[55]

Justice Gorsuch

Justice Gorsuch noted that *Casey* itself did not follow *stare decisis* principles in rejecting *Roe*'s trimester framework and adopting the undue burden standard, a test which was virtually unknown in the law previous to *Casey*.[56] Similarly, the Supreme Court did not follow *stare decisis* in adopting a benefits-burdens analysis in *Whole Woman's Health v. Hellerstedt* or subsequently splintering over whether the same benefits-burdens analysis applies to abortion litigation in *June Medical Services LLC v. Russo*.[57] According to Justice Gorsuch, the undue burden standard has been unworkable, and if the Supreme Court rejects the viability line, he questions whether there is "any other intelligible principle that the Court could choose?"[58]

Justice Kavanaugh

Justice Kavanaugh clarified that Mississippi was not arguing that "the [Supreme] Court somehow has the authority to itself prohibit abortion or that this Court has the authority to order the states to prohibit abortion."[59] According to Justice Kavanaugh's inquiry, "the Constitution is silent and, therefore, neutral on the question of abortion….the Constitution is neither pro-life nor pro-choice on the question of abortion but leaves the issue for the people of the states or perhaps

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[52] *Id*. at 33.
[53] *Id*. at 33–34.
[54] *Id*. at 95–100.
[55] *Id*. at 41.
[56] *Id*.
[57] *Id*. at 60; *see* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) *and* June Med. Servs. LLC v. Russo, 140 S. Ct. 2103 (2020).
[58] *Id*. at 104.
[59] *Id*. at 43.

Congress to resolve in the democratic process."[60] In terms of *stare decisis*, Justice Kavanaugh noted that some of the most important cases in the Supreme Court's history were cases that overruled precedent.[61]

Justice Barrett

Justice Barrett examined a woman's reliance interests under abortion. Since *Casey*, every state now has a "Safe Haven Law," which allows a mother to terminate her parental rights and duties following the birth of her child in a manner that is safe for the child.[62] In this regard, Justice Barrett questioned whether an abortion right "is grounded primarily in the bearing of the child, in the carrying of a pregnancy, and not so much looking forward into the consequences on professional opportunities and work life and economic burdens."[63]

The Justice further noted that *stare decisis* is "not an inexorable command and that there are some circumstances in which overruling is possible," such as in *Brown v. Board of Education* and *West Coast Hotel Co. v. Parrish*.[64] Justice Barrett also posed a hypothetical to the abortion clinic, questioning whether a state constitution limiting abortions after twenty-seven weeks gestation would be unconstitutional if the state used an undue burden standard. The hypothetical invoked *Roe*'s trimester framework, and Justice Barrett indicated the hypothetical's 27-week line and *Casey*'s viability line were both arbitrary and "[she doesn't] understand why 27 weeks is less workable than 24."[65]

What Comes Next

The Supreme Court likely will issue its *Dobbs* decision early next summer. At the very least, the Supreme Court seems poised to discard the viability line in *Casey*'s undue burden standard. If the Court retains the undue burden test, but without its viability line, the test will apply to all stages of pregnancy. States could regulate abortion at all gestational ages to further maternal health or prenatal life so long as the law is based on reasonable grounds and does not pose an undue burden to women seeking abortion.

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[60] *Id*. at 43–44; *see id*. at 76–77, 107.
[61] *Id*. at 78–79.
[62] *Id*. at 56.
[63] *Id*. at 58.
[64] *Id*. at 45; *see* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (overruling Plessy, 163 U.S. 537) *and* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling Lochner, 198 U.S. 45).
[65] Transcript of Oral Argument, *supra* note 3, at 81–82.

Chief Justice Roberts appeared to propose a "reasonable possibility" test for obtaining an abortion.[66] It is unlikely that the Court will adopt this test, as no other Justice discussed it. The abortion clinic even rejected the proposed reasonable possibility test in favor of *Casey*'s undue burden standard and arbitrary viability line.

Another possible outcome is that the Court overrules *Casey* and *Roe* altogether. In that situation, states could regulate abortion under the rational basis test, which upholds statutes that have a legitimate state interest that is rationally connected to the statute's goals. As Justice Kavanaugh clarified during oral argument, if the Supreme Court overrules *Roe* and *Casey*, then the issue merely would return to the states. There would not be a federal prohibition on abortion. Rather, abortion prohibitions or state legal protections of a purported abortion right would vary state by state.[67]

As the Supreme Court is poised to limit or overturn *Casey* and *Roe*, pro-life work becomes more critical at the state and local level. The pro-life movement should bolster pregnancy resources centers as a life-affirming alternative to abortion. States similarly should pass pro-life legislation to support women's health and safety and reaffirm the dignity of unborn children. *Dobbs* likely will overturn or limit *Roe*, but the fight for Life will continue in the states.

[66] *Id*. at 53.
[67] *See* AMS. UNITED FOR LIFE, DEFENDING LIFE 2021 (2021 ed.) (discussing abortion laws in each state).