



The Attorney General's Playbook for a Post-Roe World

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After a forty-nine-year struggle, the Supreme Court finally overruled *Roe v. Wade*¹ and its pernicious progeny, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.² In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court unequivocally “h[e]ld that *Roe* and *Casey* must be overruled,” and “return[ed] the issue of abortion to the people’s elected representatives.”³ Yet, the question arises: what comes next?

Status of Abortion Policies

Abortion policy now depends upon each state.⁴ Americans United for Life has prepared a comprehensive analysis of the pro-life protections in each state.⁵ Some states have pre-*Roe* laws in place that protect women and unborn children at all gestational ages. Other states have prepared conditional laws that spring into effect upon the overturn of *Roe* or the attorney general’s certification that the law may go into effect. Some middle-ground states have pro-life protections, but their abortion-activist state judiciaries have concocted a state constitutional abortion right that limits these life-affirming laws. Yet other states have completely abandoned unborn children, mothers, and families by permitting late-term abortions with virtually no meaningful health and safety safeguards.

Conditional Laws

Thirteen states have prepared for the overturn of *Roe* by passing abortion conditional laws. A conditional law is a law that remains legally inactive until some statutorily specified event occurs. Americans United for Life has analyzed these statutes and compiled a chart listing the conditions for each law.⁶ Again, *Dobbs* explicitly “h[e]ld that *Roe* and *Casey* must be overruled,” which has activated some

¹ 410 U.S. 113 (1973).

² 505 U.S. 833 (1992).

³ 597 U.S. ___, slip op. at 5–6 (2022).

⁴ See *State Spotlight*, Ams. United for Life, <https://aul.org/spotlight/> (last visited June 27, 2022) (providing an interactive map of each state’s pro-life laws and current legislation).

⁵ Natalie M. Hejran, *Is Your State Ready for Roe to Go?*, Ams. United for Life (Mar. 16, 2022), <https://aul.org/2022/03/16/is-your-state-ready-for-roe-to-go/>.

⁶ Michael D. Potter, *Which States Are Ready for a Post-Roe Paradigm?*, Ams. United for Life (June 24, 2022), <https://aul.org/2022/06/24/which-states-are-ready-for-a-post-roe-paradigm/>.

conditional laws. In Kentucky, Louisiana,⁷ Oklahoma, and South Dakota, the conditional laws immediately went into effect upon the release of the *Dobbs* decision. The *Dobbs* decision activated the conditional laws in Idaho, Tennessee, and Texas, and they will go into effect after thirty days.

Other states need the governor, attorney general, or state legislature to certify that the Supreme Court has overruled *Roe* in order to activate the conditional law. The conditional laws in Arkansas,⁸ Missouri,⁹ and Utah¹⁰ are certified and in effect. Wyoming's conditional law will take effect five days after certification, Mississippi's law¹¹ will take effect ten days after certification, and North Dakota's law will take effect thirty days after certification.

Abortion Litigation in the Federal Courts

Americans United for Life regularly tracks and prepares a Life Litigation Report detailing the status of bioethics lawsuits.¹² At least twenty-four abortion cases in the federal courts were held pending *Dobbs* or rescheduled to accommodate the *Dobbs* decision. There already is action in these lawsuits. In *Reproductive Health Services v. Parson*, which challenged Missouri's cascading gestational limits and prenatal nondiscrimination provisions, the abortion business filed a motion to dismiss the case as moot and to vacate the district court's preliminary injunction orders within hours of the *Dobbs* decision.¹³ According to the plaintiff, "[t]he Supreme Court has now resolved the issue at hand in this case [*i.e.*, application of *Roe* and *Casey* to Missouri law], and there is no longer a case or controversy for this Court to decide."¹⁴ In other cases, trial courts have granted states' emergency motions to dissolve preliminary injunctions based upon the Supreme Court's explicit overturn of *Roe* and *Casey*.¹⁵

⁷ June Medical Services has sued to enjoin the law in state court. *June Med. Servs., LLC v. Landry*, No. 22-5633 (La. Dist. Ct. filed June 27, 2022).

⁸ Attorney General Leslie Rutledge certified the conditional law on June 24, 2022.

⁹ Attorney General Eric Schmitt certified the conditional law on June 24, 2022.

¹⁰ The Utah legislative general counsel certified the conditional law on June 24, 2022. Planned Parenthood has sued to enjoin the law in state court under a state constitutional cause of action. *Planned Parenthood Ass'n of Utah v. State of Utah*, No. ___ (Utah Dist. Ct. filed June 25, 2022).

¹¹ Attorney General Lynn Finch certified the conditional law on June 27, 2022. Jackson Women's Health Organization has sued to enjoin the law in state court under a state constitutional privacy claim. *Jackson Women's Health Org. v. Dobbs*, No. G2022-739013 (Miss. Ch. Ct. filed June 27, 2022).

¹² See, e.g., Carolyn McDonnell, *2022 Q2 Life Litigation Report*, Ams. United for Life (June 2022), <https://aul.org/wp-content/uploads/2022/06/2022-Q2-Life-Litigation-Report-FINAL.pdf>.

¹³ Motion of Plaintiffs-Appellees to Dismiss the Appeal as Moot, *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, No. 19-2882 (8th Cir. June 24, 2022).

¹⁴ *Id.* at 1.

¹⁵ See, e.g., *Robinson v. Marshall*, No. 2:19-cv-365 (M.D. Ala. June 24, 2022) (granting the State's unopposed emergency motion to dissolve the preliminary injunction); *Pre-term-Cleveland v. Yost*, No. 1:19-cv-360 (S.D. Ohio June 24, 2022) (granting the State's emergency motion to dissolve the

Rational Basis Review

In *Dobbs*, the Supreme Court recognized that abortion laws only are subject to rational basis review. The Court explains: “[u]nder our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution’s text or in our Nation’s history.”¹⁶ Accordingly, “States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot ‘substitute their social and economic beliefs for the judgment of legislative bodies.’”¹⁷ The Court recognizes that:

These legitimate interests include respect for and preservation of prenatal life at all stages of development . . . the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.¹⁸

Furthermore, “[a] law regulating abortion, like other health and welfare laws, is entitled to a ‘strong presumption of validity.’”¹⁹

Procedural Arguments

In the majority *Dobbs* opinion, Justice Alito describes the “abortion distortion” *Roe* had on legal jurisprudence, explaining that “*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines.”²⁰ Under *Roe* and *Casey*’s now-obsolete abortion jurisprudence, “no legal rule or doctrine [wa]s safe from ad hoc nullification by [the Supreme] Court when an occasion for its application arises in a case involving a state regulation of abortion.”²¹ The abortion distortion mangled:

the strict standard for facial constitutional challenges . . . third-party standing doctrine . . . standard *res judicata* principles . . . the ordinary rules on the severability of unconstitutional provisions . . . the rule that statutes should be read where possible to avoid unconstitutionality. . . [and] First Amendment doctrines.²²

preliminary injunction in part by dissolving the preliminary injunction but declining to dismiss the case).

¹⁶ *Dobbs*, slip op. at 77.

¹⁷ *Id.* (citations omitted).

¹⁸ *Id.* at 78.

¹⁹ *Id.* at 77 (citation omitted).

²⁰ *Id.* at 62 (citations omitted).

²¹ *Id.* (citations omitted).

²² *Id.* at 63.

Following *Roe v. Wade*, abortion litigation proceeded under the presumption that there was a federal constitutional abortion right. However, *Dobbs* not only overruled *Roe* and *Casey*, it also recognized 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.”²³ The Court also foreclosed any abortion challenges under the Equal Protection Clause, holding “laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.”²⁴ Consequently, abortion has no constitutional protection and states should therefore renew procedural challenges to abortion lawsuits, particularly to the § 1983 cause of action, third-party standing, and mootness.

Underlying Constitutional Right for a § 1983 Lawsuit

Abortionists bring their constitutional challenges to abortion laws in the federal courts under 42 U.S.C. § 1983, alleging a deprivation of *Roe* and *Casey*’s abortion right. The statute provides:

Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]²⁵

Notably, § 1983 does not confer any substantive rights. Rather, there must be a deprivation of a right secured under another law. As the Supreme Court describes in *McDonald v. City of Chicago*, “[§ 1983] prohibits state officials from depriving citizens of ‘any rights, privileges, or immunities *secured by the Constitution.*’ . . . Although the Judiciary ignored this provision for decades after its enactment, this Court has come to interpret the statute, unremarkably in light of its text, as protecting constitutionally enumerated rights.”²⁶

States should challenge the court’s subject matter jurisdiction over § 1983 abortion claims. *Dobbs* explicitly held abortion is not protected by the Due Process Clause, Equal Protection Clause, or any other federal constitutional provision. Accordingly, there cannot be a § 1983 claim since there is no underlying constitutional abortion right. Courts should dismiss these lawsuits for lack of subject matter jurisdiction over the § 1983 lawsuit.

²³ *Id.* at 5.

²⁴ *Id.* at 11.

²⁵ 42 U.S.C. § 1983.

²⁶ 561 U.S. 742, 836 (2010) (citation omitted) (emphasis in original).

Third-Party Standing

Abortion businesses have asserted third-party standing on behalf of their patients' purported constitutional abortion rights. In *Singleton v. Wulff*, the Supreme Court "conclude[d] that it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision."²⁷ In *June Medical Services v. Russo*, the plurality noted the Court "ha[s] long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations" and, thus, permitted the abortionists' third-party standing.²⁸ Yet, these cases presumed that abortionists were asserting the constitutional rights of their patients.²⁹

Dobbs explicitly refuted that the Constitution secures an abortion right, whether under the Due Process Clause, Equal Protection Clause, or any other constitutional provision. Abortion is not secured as a right under any federal statute either. Accordingly, states should raise a third-party standing challenge because there is no federal abortion right for which abortionists can claim third-party standing.

Mootness

States should raise a mootness challenge to existing abortion litigation that arose under *Roe* and *Casey's* purported abortion right. As the Supreme Court describes mootness in *DeFunis v. Odegaard*:

"[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." . . . The inability of the federal judiciary "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy."³⁰

In abortion litigation, abortionists have alleged health and safety laws violate their patient's due process rights and fail under *Casey's* undue burden standard. In *Dobbs*, the Supreme Court conclusively decided the Constitution does not protect abortion and overruled *Roe* and *Casey*. Abortionists' lawsuits that allege a constitutional violation are not viable since there is no underlying constitutional abortion right. Similarly, an abortion law cannot violate *Roe* or *Casey* since *Dobbs* explicitly overruled those cases.

²⁷ 428 U.S. 106, 118 (1976).

²⁸ 140 S. Ct. 2103, 2118 (2020).

²⁹ See, e.g., *id.* at 2139 n.4 (Roberts, C.J., concurring in the judgment) ("I agree that the abortion providers in this case have standing to assert the *constitutional* rights of their patients." (emphasis added))

³⁰ *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (citation omitted).

Notably, abortionists in *Reproductive Health Services v. Parson* have filed a motion to dismiss the appeal as moot, and similarly filed a notice of voluntary dismissal in the trial court case since “there is no longer a case or controversy for this Court to decide.”³¹ As *Reproductive Health Services* wrote, “[t]he case at hand and its appeal arose out of a controversy regarding the application of prior Supreme Court precedent—including *Roe* and *Casey*—to Missouri’s recently enacted abortion bans . . . That controversy no longer exists.”³² “While an actual controversy did exist at the time of filing, the intervening Supreme Court decision in *Dobbs* renders that controversy nonexistent. This appeal has been rendered moot and should be dismissed.”³³ States should look to make similar mootness challenges in existing federal court abortion litigation.

Civil Procedure Rule 60(b)(5) Motions

For years *Roe* and *Casey* have wreaked devastation on life-affirming laws. Many pro-life laws remain on the books but are unenforceable due to permanent injunctions. In addition, abortionists-plaintiffs have received many thousands of dollars in attorney’s fees for prevailing on their constitutional challenges to abortion laws under *Casey*’s undue burden standard.

States should consider Rule 60(b)(5) motions to vacate these permanent injunctions and possibly reclaim attorney’s fees. Rule 60(b) permits a court, “[o]n motion and just terms,” to “relieve a party . . . from a final judgment, order or proceedings” for certain reasons. Rule 60(b)(5) particularly allows relief if “the judgment . . . is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.”

These motions “must be made within a reasonable time.”³⁴ “What constitutes a reasonable time under Rule 60(b) depends on the particular facts of the case in question . . . it involves an assessment of all the attendant facts and circumstances.”³⁵

R. 60(b)(5) Motions Regarding the Judgment of the Underlying Abortion Law

The Supreme Court explains in *Horne v. Flores* that “Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests.”³⁶ However, “the Rule provides a means by which a party can ask a court to modify or

³¹ Motion of Plaintiffs-Appellees to Dismiss the Appeal as Moot at 1, *supra* note 12, at 1.

³² *Id.* at 2.

³³ *Id.*

³⁴ Fed. R. Civ. P. 60(c)(1).

³⁵ *Fed. Land Bank of St. Louis v. Cupples Bros.*, 889 F.2d 764, 767 (8th Cir. 1989); see *In re Pac. Far E. Lines, Inc.*, 889 F.2d 242, 249 (9th Cir. 1989) (“What constitutes a reasonable time ‘depends on the facts of each case.’”).

³⁶ 557 U.S. 433, 447 (2009).

vacate a judgment or order if ‘a significant change either in factual conditions or in law’ renders continued enforcement ‘detrimental to the public interest.’”³⁷

Supreme Court precedent indicates parties can use a Rule 60(b)(5) motion to seek relief from a previous constitutional law decision. In *Agostini v. Felton*, petitioners asked for relief from a permanent injunction that was based on a previous Establishment Clause interpretation that the Court had effectively overruled.³⁸ Since the Establishment Clause case law had “significantly changed,” the *Agostini* Court held petitioners were entitled to relief under Rule 60(b)(5).³⁹ As the Court describes, “it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show ‘a significant change either in factual conditions or in law.’ A court may recognize subsequent changes in either statutory or decisional law.”⁴⁰

Since the Supreme Court explicitly overruled *Roe* and *Casey* in *Dobbs*, there has been a “significant change” in abortion law. The permanent injunctions were ordered under *Casey*’s undue burden standard, which is now defunct law.

R. 60(b)(5) Motion Regarding Attorney’s Fees

As described above, abortion providers bring lawsuits under § 1983 for the deprivation of a constitutional right. Known as the “American Rule,” there “is the general rule in this country that, unless Congress provides otherwise, parties are to bear their own attorney’s fees.”⁴¹ Congress, however, provides a fee shifting framework for § 1983 lawsuits. “In any action or proceeding to enforce a provision of section[] . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs”⁴²

Rule 60(b)(5) motions are a feasible option for regaining attorney’s fees. “Courts considering Rule 60(b)(5) motions are generally, and correctly, solicitous of a movant seeking relief when a prior judgment on which the challenged judgment relies has been vacated.”⁴³ In a motion to vacate the fees award, the Ninth Circuit describes, “[s]ince the fee award is based on the merits judgment, reversal of the merits removes the underpinnings of the fee award. Were we to accept the [] argument that Rule 60(b)(5) is inapplicable here, we would be hard pressed to figure out where it ever would apply.”⁴⁴ Similarly, the Second, Fifth, and Seventh have found that Rule

³⁷ *Id.* (citation omitted).

³⁸ 521 U.S. 203, 208–209 (1997); *see also Griffin v. Sec’y, Fla. Dep’t of Corr.*, 787 F.3d 1086, 1089–1091 (11th Cir. 2015) (analyzing Rule 60(b)(5) motions under Supreme Court precedent).

³⁹ *Agostini*, 521 U.S. at 237.

⁴⁰ *Id.* at 215.

⁴¹ *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994) (citation omitted).

⁴² 42 U.S.C. § 1988(b).

⁴³ *Thai-Lao Lignite (Thailand) Co. v. Gov’t of the Lao People’s Democratic Republic*, 864 F.3d 172, 186 (2d Cir. 2017) (citing cases).

⁴⁴ *Cal. Med. Ass’n v. Shalala*, 207 F.3d 575, 577–578 (9th Cir. 2000)

60(b)(5) motions are appropriate when a court vacates the underlying judgment.⁴⁵ The underlying facts in the Second, Seventh, and Ninth Circuit cases indicate those defendants were asking for a “reimbursement” or “refund” of paid attorneys’ fees.⁴⁶ States similarly should utilize Rule 60(b)(5) motions for refunding attorney’s fees from prior abortion litigation.

Abortion Litigation in the State Courts

State courts will become the battlegrounds for abortion litigation in our post-*Roe* world. The Center for Reproductive Rights, for example, recently published a report on state constitutional abortion rights, urging activist litigation to manufacture new abortion “rights.”⁴⁷ Unfortunately, some state judiciaries have already contrived a state constitutional abortion right. These states include Alaska,⁴⁸ California,⁴⁹ Florida,⁵⁰ Illinois,⁵¹ Kansas,⁵² Massachusetts,⁵³ Minnesota,⁵⁴ Montana,⁵⁵ New Jersey,⁵⁶ New York,⁵⁷ and Washington.⁵⁸ In Arizona,⁵⁹ and New Mexico,⁶⁰ the state supreme courts devised constitutional protections for state Medicaid funding for “medically necessary” abortions. Notably, some of these abortion cases have relied upon *Roe* and *Casey*’s flawed legal reasoning, and now are susceptible to a pro-life challenge.

Iowa caselaw shows that these concocted abortion rights may be reexamined by state supreme courts. In 2018, the Iowa Supreme Court fabricated a state constitutional abortion right.⁶¹ Yet earlier this month in *Planned Parenthood of the Heartland, Inc. v. Reynolds*, the state supreme court reversed its previous decision,

⁴⁵ *Ass’n for Retarded Citizens v. Thorne*, 68 F.3d 547, 553 (2d Cir. 1995) (“[T]he motion [for relief from the attorney’s fee award after vacation of the merits judgment] would have been correctly granted under Rule 60(b)(5).”); *Flowers v. S. Reg’l Physician Serv.*, 286 F.3d 798, 802 (5th Cir. 2002) (“[T]hat part of the judgment that formed the basis of the granting of attorney’s fees was vacated and Rule 60(b)(5) was appropriate.”); *Maul v. Constan*, 23 F.3d 143, 144–145 (7th Cir. 1994) (holding the district court committed an abuse of discretion when it denied a Rule 60(b)(5) motion for relief from a fee award after the merits judgment was reduced to nominal damages on appeal).

⁴⁶ *Ass’n for Retarded Citizens*, 68 F.3d at 550; *Maul*, 23 F.3d at 144; *Cal. Med. Ass’n*, 207 F.3d at 576.

⁴⁷ *State Constitutions and Abortion Rights*, CTR. FOR REPROD. RTS. (2022), <https://reproductiverights.org/wp-content/uploads/2022/05/State-Constitutions-Report-5.12.22.pdf>.

⁴⁸ *Valley Hosp. Ass’n v. Mat-Su Coal. for Choice*, 948 P.2d 963 (Alaska 1997).

⁴⁹ *People v. Belous*, 458 P.2d 194 (1969); *Comm. to Def. Reprod. Rts. v. Myers*, 625 P.2d 779 (1981).

⁵⁰ *In re T.W.*, 551 So. 2d 1186 (Fla. 1989).

⁵¹ *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745 (Ill. 2013).

⁵² *Hodes & Nauser, MDS, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019).

⁵³ *Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981).

⁵⁴ *The Women of the State of Minn. v. Gomez*, 542 N.W.2d 17 (Minn. 1995).

⁵⁵ *Armstrong v. State*, 989 P.2d 364 (Mont. 1999).

⁵⁶ *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982).

⁵⁷ *Hope v. Perales*, 634 N.E.2d 183 (N.Y. 1994).

⁵⁸ *State v. Koome*, 530 P.2d 260 (Wash. 1975).

⁵⁹ *Simat Corp. v. Ariz. Health Care Cost Containment*, 56 P.3d 28 (Ariz. 2002).

⁶⁰ *Boyd v. Johnson*, 975 P.2d 841 (N.M. 1998).

⁶¹ *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206 (Iowa 2018).

holding that abortion is not a fundamental right under the state constitution.⁶² As the court writes: “[its previous decision] lacks textual and historical support. It is doctrinally inconsistent with prior Iowa jurisprudence concerning family rights that followed a balancing approach. Its rhetoric is one-sided. Its constitutional footing is unsound.”⁶³

Going forward, states should raise challenges to existing state constitutional abortion “rights,” and vigorously defend against judicial activism that seeks to concoct state constitutional protection for abortion.

The Path Ahead

The future is bright now that the Supreme Court has reversed *Roe* and *Casey*. The undue burden standard is defunct and federal courts will apply rational basis review to abortion litigation instead. This also means abortion has become a state-by-state battle, and we expect litigation over whether state constitutions protect abortion “rights.” Americans United for Life is committed to assisting states in defending life and is preparing comprehensive resources on defending Life in the states in a post-*Roe* world. We will continue to fight until the law protects all human beings, from conception until natural death.

⁶² *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, No. 21-0856 (Iowa June 17, 2022); see Carolyn McDonnell, *Iowa Supreme Court: Abortion Isn't a “Fundamental Right”*, Ams. United for Life (June 17, 2022), <https://aul.org/2022/06/17/iowa-rules-no-fundamental-right-to-abortion/>.

⁶³ *Planned Parenthood of the Heartland, Inc.*, No. 21-0857, slip op. at 60.