



# Supreme Court Considers Mississippi Abortion Law

December 13, 2021

On December 1, 2021, the U.S. Supreme Court heard [oral argument](#) in *Dobbs v. Jackson Women’s Health Organization*, a case involving the constitutionality of Mississippi’s [Gestational Age Act](#) (GAA), which generally prohibits an abortion once a fetus’s gestational age is greater than 15 weeks. In *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, two of the Court’s seminal abortion decisions, the Court recognized viability, the point in a fetus’s development when it is potentially able to live outside of the mother’s womb, as the earliest time at which a state may prohibit the performance of an abortion. In *Roe* and *Casey*, the Court recognized viability as occurring at around 23 to 24 weeks. Mississippi’s Solicitor General argued that the GAA should be upheld despite Supreme Court precedent restricting abortion prohibitions before fetal viability. The state contended that *Roe* and *Casey* were wrongly decided and maintained that the GAA furthers valid state interests in protecting the “unborn” and women’s health.

## Background

In 1973, the Supreme Court concluded in *Roe* that the U.S. Constitution protects a woman’s decision to terminate her pregnancy. Justice Blackmun, writing for himself and six other Justices, determined that a right of privacy derived from the Fourteenth Amendment’s concept of personal liberty under the [Due Process Clause](#) and recognized by the Court in prior decisions, was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” The decision in *Roe* followed several Court decisions describing a right of privacy that extended to activities related to [marriage](#), [procreation](#), [contraception](#), [family relationships](#), [child rearing](#), and [education](#).

While the Court in *Roe* recognized a woman’s constitutionally protected right to terminate a pregnancy, it also determined that the right had to be weighed against a state’s important interests in promoting maternal health and protecting potential life. The Court held that the state’s interests become sufficiently compelling to allow regulation of the abortion procedure at certain points during pregnancy, and established the so-called “trimester framework” to examine such regulations. Finding that an abortion is no more dangerous to maternal health than childbirth in the first trimester of pregnancy, the Court concluded that the compelling point for regulating abortion to further a state’s interest in maternal health was at approximately the end of the first trimester—that is, at about 12 weeks. Until that point, the Court

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determined that a decision to have an abortion and its effectuation were to be left exclusively to the medical judgment of the pregnant woman's doctor in consultation with the patient. The Court further articulated that, after the end of the first trimester, the state could promote its interest in maternal health by regulating the abortion procedure in ways reasonably related to maternal health. The Court further held that the compelling point with respect to the state's other interest (i.e., in potential life) was at viability, and only after that point could a state regulate and even proscribe the procedure, except when necessary to preserve the life or health of the mother. The Court reasoned that the state's interest is compelling at this point "because the fetus then presumably has the capability of meaningful life outside the mother's womb" and that restrictions protecting fetal life after viability "ha[ve] both logical and biological justifications."

In 1992, the Court reconsidered how abortion regulations would be evaluated. In *Casey*, a plurality of the Court rejected *Roe*'s reliance on a trimester framework, explaining that "in its formulation [the framework] misconceives the pregnant woman's interest . . . and in practice it undervalues the State's interest in potential life[.]" In its place, the plurality adopted a standard under which an abortion regulation would be invalidated if it imposed an undue burden; that is, if it "ha[d] the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." The Court reasoned that the new undue burden standard better reconciled the government's interest in potential life with a woman's right to decide to terminate her pregnancy. While *Roe* generally restricted the regulation of abortion during the first trimester, *Casey* emphasized that not all of the burdens imposed by an abortion regulation were likely to be undue.

In adopting the new undue burden standard, *Casey* nonetheless reaffirmed the "essential holding" of *Roe*, which the Court described as having three parts. First, a woman has a right to choose to have an abortion prior to viability without undue interference from the state. Before viability, the Court explained, the state's interests "are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." Second, the state has a right to restrict abortions after viability so long as the regulation provides an exception for pregnancies that endanger a woman's life or health. Third, the state has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus.

Although the Court's recent abortion decisions have explored how the undue burden standard should be applied, the Court has consistently emphasized *Roe*'s essential holding with regard to prohibitions on pre-viability abortions. For example, in *Gonzales v. Carhart*, a 2007 decision involving the federal Partial-Birth Abortion Ban Act, the Court maintained that "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'"

### ***Dobbs v. Jackson Women's Health Organization***

Shortly after Mississippi enacted the GAA, abortion provider Jackson Women's Health Organization (JWHO) and its medical director challenged the law as inconsistent with *Roe* and *Casey*. Mississippi argued that by only regulating abortion and providing exceptions for life-endangering medical emergencies and certain other conditions, the GAA did not place an undue burden on a woman's right to terminate her pregnancy.

In 2018, the U.S. District Court for the Southern District of Mississippi permanently enjoined the GAA. The court rejected Mississippi's attempt to characterize the GAA as an abortion regulation rather than a prohibition on the procedure. The court indicated that the undue burden standard is inapplicable when a state seeks to prohibit the performance of pre-viability abortions. Emphasizing the Act's full title—"An Act to be Known As the Gestational Age Act; To Prohibit Abortions After 15 Weeks' Gestation"—the court observed: "This Act is a ban. It is not a regulation." Citing *Casey*, the court maintained that "[t]here is no legitimate state interest strong enough, prior to viability, to justify a ban on abortions."

On appeal to the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit), Mississippi contended that the district court should have applied the undue burden standard to the GAA and that the law should have been upheld under that standard. The state characterized the GAA as only regulating the time period during which an abortion could be performed and not a prohibition on the procedure. The state maintained that “the Act is not a ban because it allows abortions before 15 weeks, . . . it contains exceptions, and, practically speaking, it only limits the relevant time frame by one week, since the Clinic (the only abortion provider in Mississippi) does not perform abortions after 16 weeks . . .” Mississippi also argued that the district court should have considered the state’s interests in maternal health, potential life, and those in the medical profession when evaluating the GAA, as the Supreme Court had done in *Gonzales*.

In 2019, the Fifth Circuit [affirmed](#) the district court’s decision. Like the district court, the Fifth Circuit viewed the GAA as a ban on pre-viability abortions and not a regulation of the procedure. Thus, the appellate court distinguished the case from *Gonzales* and other cases involving the regulation of pre-viability abortions: “[T]he State asks us to extend the undue-burden analysis past *Casey*’s clear demarcation. That the Act does not ban all abortions, but only those after 15 weeks . . . does not change the fact that viability is the critical point.”

The Supreme Court agreed to review the Fifth Circuit’s decision in May 2021. The question before the Court in *Dobbs* is whether all pre-viability prohibitions on elective abortions are unconstitutional. During oral argument before the Court, Mississippi [contended](#) that the heightened level of judicial review prescribed by *Roe* and *Casey* for abortion restrictions is inappropriate because neither the Constitution’s text nor its structure guarantees a right to abortion. The state believes that abortion restrictions should instead be subject to “rational basis” review, a lower level of judicial scrutiny that applies when a constitutional right is not at stake. Rational basis review evaluates whether a law is rationally related to legitimate government interests. At oral argument, Mississippi’s Solicitor General observed that “no standard other than the rational basis review that applies to all laws will promote an administrable, workable, practicable, consistent jurisprudence that . . . puts matters back with the people. I think anything heightened here is going to be problematic.”

The state further argued for *Roe* and *Casey* to be overruled because, in its view, the decisions have proved unworkable and there have been relevant factual developments since the cases were decided. According to the state, for example, medical and scientific advances have eroded the Court’s past assumptions about viability. In its [brief](#) for the Court, Mississippi indicated that these advances show that a fetus “has taken on the human form in all relevant respects by 12 weeks’ gestation.” The state further noted that our knowledge of when a fetus becomes sensitive to pain has “progressed considerably.” The state maintained that *Roe* and *Casey* impede the government from responding to this information by prohibiting pre-viability abortions.

JWHO [argued](#) against the Court overruling *Roe* and *Casey*. The organization contended that these decisions correctly recognized a right to terminate a pregnancy and a viability standard for efforts to prohibit abortions. At oral argument, JWHO noted that Mississippi’s arguments against *Roe* and a viability standard were similar to ones made by the State of Pennsylvania in *Casey*. The organization observed that the Court carefully considered those arguments before reaffirming *Roe*’s essential holding in *Casey*, and that there have been no legal or factual changes since *Casey* that justify a change in position. In response to Mississippi’s argument about the unworkability of the undue burden standard, in particular, JWHO emphasized that the standard applies to abortion regulations and not pre-viability abortion prohibitions, and that federal courts have uniformly and predictably applied the viability standard since *Roe* was decided. JWHO further highlighted that pre-viability abortion bans like the GAA have generally been [invalidated](#) by federal appellate courts.

At oral argument, the Solicitor General of the United States also [advocated](#) against overruling *Roe* and *Casey*. Noting the substantial individual and societal reliance on the right to abortion, the Solicitor

General maintained that the Court “has never revoked a right that is so fundamental to so many Americans and so central to their ability to participate fully and equally in society.”

## Considerations for Congress

The Supreme Court is not expected to issue a decision in *Dobbs* until early summer 2022. If the Court concludes that pre-viability abortion prohibitions are permissible, it seems possible that there could be greater support for federal legislation similar to the GAA. Federal legislation could potentially supersede varying state requirements and create a uniform national standard. Bills like the GAA were passed by the House of Representatives during the 113th, 114th, and 115th Congresses. The Pain-Capable Unborn Child Protection Act (PCUCPA), introduced as H.R. 1080 and S. 61 in the 117th Congress, would generally prohibit the performance or attempted performance of an abortion once the probable post-fertilization age of the fetus is 20 weeks or greater. The PCUCPA states that it would further a “compelling governmental interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.”

Conversely, if the Court were to overrule *Roe* and *Casey*, determining that the Constitution does not guarantee a right to abortion, those who support such a right might promote legislation that would establish a statutory right to access to the procedure. The Women’s Health Protection Act (WHPA), introduced as H.R. 3755 and S. 1975 in the 117th Congress, would provide such a right and preempt state restrictions on the procedure. The House passed H.R. 3755 on September 24, 2021. The bill is awaiting further consideration in the Senate. Additional information on the WHPA is included in CRS Report [Abortion: Judicial History and Legislative Response](#).

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