

# Client Alert: The Supreme Court Overturns *Roe v. Wade*

## Legal Update: The Supreme Court Overturns *Roe v. Wade*

In a [6-3 decision](#) released Friday (*Dobbs v. Jackson Women's Health Organization*), the Supreme Court's conservative majority upheld a Mississippi law restricting virtually all abortions after the 15<sup>th</sup> week of pregnancy. More significantly, the Court overturned the watershed decisions of *Roe v. Wade* and *Planned Parenthood v. Casey*. Although *Roe*'s reversal was decided with a slimmer 5-4 majority—with Chief Justice Roberts diverging from his conservative colleagues—the *Dobbs* decision signals a seismic shift for the future of reproductive rights in the United States.

Half a century ago, *Roe* established a constitutional right to abortion — a right that was reaffirmed under *Casey* some two decades later. The reversal of these two decisions means that the ability to access a lawful abortion will now depend almost entirely on state-made regulations and statutes. The Guttmacher Institute expects that some [26 states](#) will adopt laws that severely restrict abortions in the coming months, with some states criminalizing the procedure. In contrast, pro-choice states will likely look for ways to expand access and strengthen reproductive protections within their jurisdictions.

## What happens next?

President Biden and the Democratic Party may come under enormous political pressure to enact legislation that would protect access to abortion throughout the country. The DNC, with a slim, vulnerable majority in both houses of Congress, may try to pass such a statute prior to midterm elections. However, a permissive federal law can be [challenged on the grounds](#) that Congress lacks the constitutional authority under the Commerce Clause to legislate so broad a right. There is also the added risk that any law passed by the present Congress can be abolished by a future, more conservative Congress.

In their concurring and dissenting opinions, several justices signaled that they expect a slew of additional legal battles to result from the Court's reversal of *Roe*. In his concurrence, Justice Thomas noted that, in the future, the Supreme Court "[should reconsider](#)" past rulings upholding rights to obtain contraceptives, rights to engage in same-sex relationships, and rights to same-sex marriage. In Justice Thomas's view, the legal basis for these rights is woven of the same constitutional fabric underpinning abortion rights. It is notable, however, that the majority opinion expressly purports to limit itself to the context of the right to abortion only: "But we have stated unequivocally that '[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.' We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed 'potential life.' Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by 'appeals to a broader right to autonomy.' It is hard to see how we could be clearer."

In another concurrence, Justice Kavanaugh notes that women living in restrictive states will travel to permissive ones if they want to obtain an abortion. Anticipating that some states may try to prevent its citizens from traveling to permissive jurisdictions to terminate a pregnancy, Justice Kavanaugh proffered a clear warning:

"[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. May a State retroactively impose liability or punishment for an abortion that occurred before today's decision takes effect? In my view, the answer is no based on the Due Process Clause or the *Ex Post Facto* Clause.

Meanwhile, for providers of telemedicine abortion services and medication abortions, the liberal justices raise the most salient questions:

"Finally, the majority's ruling today invites a host of questions about interstate conflicts. Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising out-of-state abortions or helping women get to out-of-state providers? Can a State interfere with the mailing of drugs used for medication abortions? The Constitution protects travel and speech and interstate commerce, so today's ruling will give rise to a



host of new constitutional questions. Far from removing the Court from the abortion issue, the majority puts the Court at the center of the coming 'interjurisdictional abortion wars.'"

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*Nelson Hardiman is hosting a series of webinars delving deeper into the regulatory questions at the intersection of telemedicine and abortion, beginning **June 29th**. For additional information, please visit our [event website](#). In the interim, please feel free to email us at [info@nelsonhardiman.com](mailto:info@nelsonhardiman.com).*

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