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Statutorily-created state abortion bans have become an unfortunate trend in the United States, however, their constitutionality is highly-contested and hotly-debated among politicians, medical professionals, and the general public. Several states have successfully (and some unsuccessfully) limited a woman’s right to terminate her pregnancy beyond a certain point, with some bans taking effect as little as 6 weeks into pregnancy. These questionable laws have been the subject of major litigation, including a Mississippi case pending before the United States Supreme Court, *Dobbs v. Jackson Women’s Health Organization*, 141 S.Ct. 2619 (Mem), 209 L.Ed.2d 748.

The litigation in *Dobbs* was sparked by Mississippi’s Gestational Age Act, which banned elective abortion in Mississippi after 15 weeks of pregnancy. MS Code § 41-41-191 (2018). The Gestational Age Act (“Act”) was passed into law in 2018. However, since its enactment, the ban has not gone into effect due to legal challenges. Both the District Court and the Fifth Circuit Court of Appeals have held that the Act violates a woman’s constitutional right to obtain an abortion up until fetal viability, as established in *Roe v. Wade*, 410 U.S. 113 (1973), and affirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

In *Dobbs*, the Court is currently grappling with the question of “[w]hether all pre-viability prohibitions on elective abortion are unconstitutional.” Transcript, Argument before the United States Supreme Court, *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392, December 1, 2021, T37. Petitioners (collectively, “Mississippi”)¹ assert that not all pre-viability prohibitions on elective abortion are unconstitutional. *Id.* at T37, T38. Mississippi argues that a state may implement a pre-viability abortion restriction because nothing in the Constitution specifically addresses a woman’s right to obtain an abortion. *Id.* at T4. Mississippi further contends that the *stare decisis* established in *Roe* and *Casey* represents “egregious error” and should be overturned. *Dobbs v. Jackson Women’s Health Organization*, Petition for Writ of Certiorari, Introduction, P.1. Mississippi also contends that overwhelming *stare decisis* exists in opposition to *Roe* and *Casey*. Transcript, *Dobbs* at T12, T13.

¹ The petitioners are named individuals in their capacities as the State Health Officer of the Mississippi Department of Health and the Executive Director of the Mississippi State Board of Medical Licensure.

Respondents argue that the *stare decisis* from *Roe* and *Casey* are based in liberty, the right to bodily integrity, and the right to make decisions related to family, marriage, and childbearing. *Id.* at T49. Respondents emphasize the strength of *stare decisis* and contend that the Court has already examined and rejected every possible reason for overturning *Roe*. *Id.* at T78. Specifically, the Court described the right to an abortion as “a component of liberty it would not renounce.” *Id.* at T47, T48.

a. Applicability of *Stare Decisis*

In order to uphold the integrity of *stare decisis*, which has been a key principle in the United States’ justice system since the early 1800s, it is necessary that the ruling in *Dobbs* reaffirm *Roe* and *Casey*. These decisions established that a woman's right to choose to end her pregnancy is protected by the Constitution, and states can limit that right *only after* the second trimester, or 28 weeks of pregnancy. *Roe*, 410 U.S. at 160; *Casey*, 505 U.S. at 859. Further, these precedents have been widely supported - lower courts across various states, such as New Jersey, Alabama, and Ohio, have struck down abortion bans for violating the Constitution. *Abortion Bans: In the States*, American Civil Liberties Union, <https://www.aclu.org/other/abortion-bans-states#2> (last visited Jan. 25, 2022). Thus, Mississippi’s claim that the *stare decisis* set forth in *Roe* and *Casey* represent “egregious error” is unfounded and highly contradicted. Transcript, *Dobbs* at T48.

During oral argument, Mississippi asserted that *Roe* and *Casey* should be overturned because they present erroneous *stare decisis*. *Id.* at T12. It attempted to undermine these precedents by asserting that the viability lines drawn “discount and disregard state interests.” *Id.* at T17, T18. However, the state fails to prove that these “interests” are anything more than the state’s own “interests” in restricting a woman’s freedom - especially in cases of poor, minority women who are at greater risk of medical complications from pregnancies. *Induced Abortion in the United States*, Guttmacher Institute, <https://www.guttmacher.org/fact-sheet/induced-abortion> (Sept. 2019). The state’s interest is nothing more than a desire to exercise control over a vulnerable population and is not based on any real, protectable interest. Thus, overruling *Roe* and *Casey* would be the true “egregious error.”

Contrary to Mississippi’s argument, it is irrelevant that abortion is not specifically mentioned in the Constitution - just because a right is not listed in the Constitution, does not mean that it does not exist or cannot be inferred through interpretation. As mentioned by

members of the Court, the lack of specific reference to abortion permits the Court to take a “neutral” position on abortion and utilize this neutrality to judicially review state-created abortion laws. Transcript, *Dobbs* at T43, T77. This is the essential purpose of *stare decisis* - to ensure that legislatively-created and judicially-interpreted rights are uniformly applied and protected from infringement. The prior decisions make clear that a woman has a constitutionally-protected right to choose to terminate a pregnancy up until 28 weeks of pregnancy. To prohibit a woman from obtaining an abortion prior to this time period would be a violation of such established rights, and further, a violation of the integral principle of *stare decisis*. Moreover, Mississippi presented no new evidence or changed circumstances to show that abortions should be banned in *all* cases of pre-viability. The circumstances surrounding women’s reproductive health and rights have not changed since *Roe* and *Casey* were decided. Thus, the principle of *stare decisis* should be upheld.

b. Impact of Supreme Court Ruling

The impact of overturning *Roe* and *Casey* would have alarming consequences. The abortion ban would specifically disadvantage women of color, young women who may not know they are pregnant, women with limited incomes, and women living in rural communities. *Induced Abortion in the United States*, Guttmacher Institute (Sept. 2019). These women already experience notable barriers to accessing safe and legal abortions; overturning *Roe* and *Casey* would only exacerbate these disparities. Further, banning access to a legal, safe abortion early in pregnancy may drive some women to obtain illegal, unsafe abortions.

Hypothetically, if every state were to ban abortions at all stages of pregnancy, a woman’s only option would be to obtain, or perform herself, an illegal, unsafe abortion, likely in a non-medical setting and without proper medical training and equipment. It is unlikely that a ban would stop abortions across the nation; rather, it would prompt incredibly dangerous activity that would expand the health crisis that such a ban purports to ameliorate.

If the Court leaves the decision to the states, it is highly likely that several states, especially more conservative states, will tighten their abortion restrictions. For instance, a Texas law was recently upheld that drastically limits a woman’s timeframe to receive an abortion to 6 weeks. *In re Whole Woman’s Health*, 142 S. Ct. 701 (2022). The country has yet to see the damaging impact of this decision, but I strongly believe it will highlight the importance of expanding abortion access rather than restricting it. In addition, twelve states currently have

“trigger laws” that would automatically ban abortion in the first and second trimesters if *Roe* were overturned. Lauren Cross & Elizabeth Nash, *26 States are Certain or Likely to Ban Abortion Without Roe: Here’s Which Ones and Why*, Guttmacher Institute, <https://www.guttmacher.org> (Oct. 2021). There is also evidence to suggest that 26 states currently have laws or constitutional amendments that would make them certain to attempt to ban abortions as quickly as possible. *Id.* In addition to irreversible emotional trauma and hardship, these laws could have dire consequences that leave pregnant women without any redress besides obtaining a potentially-unsafe, illegal abortion, or traveling to another state where abortions are legal. This would be unduly costly in terms of travel and lodging, pre- and post-abortion care, and would lead to difficulties in payment options or insurance coverage (or perhaps no coverage whatsoever). The impact would extend into the workplace, where women may not be eligible for time off needed for travel, pre-abortion care, and post-abortion care. These obstacles would only be greater, and likely insurmountable, for poor and minority women.

This list of consequences is not exhaustive and may be expanded if states choose to further restrict a woman’s access to an abortion. It is unknown if states could later tighten their restrictions to prohibit a woman from obtaining an abortion at any stage in pregnancy (perhaps with exceptions, perhaps without). It is heartbreaking to try to conceive the consequences of such a decision, especially on women’s health and infant mortality rates. Although states may not be this extreme in their approach, their haste to restrict abortions does not leave much promise as to their integrity regarding women’s health and rights. Thus, it is necessary for the Supreme Court to carefully consider the large-scale, irreversible implications when rendering its decision.

It is my hope that the Supreme Court chooses to uphold the principles of *stare decisis* while simultaneously upholding the values of liberty, bodily integrity, and a woman’s right to choose. It is incredibly important that the Court considers the disparate impact that such restrictions would have on poor, minority women and understand the need to provide equitable access to abortion care. Although the future of abortion access is unknown, I am hopeful that efforts to combat restrictive abortion laws will, at a minimum, spread awareness about their inhumane and disparate consequences and positively shape future policies regarding abortion access.