

Eagle Forum Report

successor to The Phyllis Schlafly Report

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February 2022

Volume 6/Number 2

The End of Roe?

THE THIN VIABILITY LINE

by Dr. John Seago, Legislative Director, Texas Right to Life

This year promises to hold seismic shifts in the cultural, spiritual, and legal battles over abortion, so let us prepare to face these challenges with prudence, courage, and faith.

The most consequential Pro-Life development of last year was the Supreme Court of the United States agreeing to hear arguments in the *Dobbs v. Jackson* case. This case could be the vehicle to overturn or drastically reign in the two most deadly rulings in our country's history: *Roe v. Wade* and *Planned Parenthood v. Casey*. The second development is the passage of the Texas Heartbeat Act, which has saved thousands of preborn lives already, and has served as a beacon of light for how our country can move into a post-*Roe* era.

Is *Roe* Finally Over?

On May 17, 2021, the Supreme Court of the United States announced that they would hear a case that challenges the core tenets of previous rulings on elective abortion and how far states could go to protect life.

The case, *Dobbs v. Jackson Women's Health Organization*, is a challenge the abortion industry brought against a Pro-Life Mississippi law that prohibits elective abortions after 15 weeks' gestation. Jackson Women's Health Organization, the only

abortion provider in the state, argued that the law was unconstitutional and should be struck down by the court. The pro-abortion side was absolutely shocked by the unexpected announcement since the case had been sitting before SCOTUS for nearly a year, and the paper work had been distributed and rescheduled for conference more than 20 times.

While experts attempted to explain the timing and logic of the court, the abortion industry and the Pro-Life movement immediately realized the potential significance of this case. The most direct challenge of *Roe* and *Casey* since 1973 was going to be heard before a court that had just in recent years been re-shaped by President Donald J. Trump.

For almost 50 years, *Roe* has perpetrated grave injustice against the nation's most defenseless. The decision upended our constitutional order, depriving states of their ability to through Republican democracy enact legislation to protect preborn children. When SCOTUS agrees to hear a case, they accept very narrow and specific questions they will answer. In the case of *Dobbs*, the question a majority of the Justices wanted to more closely examine was "whether all pre-viability prohibitions on elec-

tive abortions are unconstitutional."

The abortion industry argued that the Mississippi Law (and numerous ones like it) was unconstitutional because SCOTUS had previously ruled against Pro-Life laws that impose an undue burden on a mother's access to abortion if the child cannot survive outside of the womb at that point in the pregnancy. In the 1992



Tabitha Walter and Kirsten Hasler

case, *Planned Parenthood v. Casey*, SCOTUS essentially drew an artificial line in a woman's pregnancy and a preborn child's development called "viability," the point at which a child could live on their own outside the womb. States could not ban abortions before this point of viability, which at the time was understood to be around 26-28 weeks gestation. Experts and Pro-Lifers alike immediately knew this logic was legally problematic and morally reprehensible.

(Continued on page 2)

The “viability line” is a terrible legal limit since viability is constantly in flux depending on developments in medicine and technology. Also, the point at which a child could survive is entirely dependent upon where the woman goes into preterm labor (e.g. *Rural West Texas vs Downtown Houston*) and the likelihood of a child surviving on his own outside the womb earlier in pregnancy varies among women due to health and other factors. So, there is no objective date in pregnancy one can point to as “the moment” of viability, but this type of exactness is necessary to determine which laws banning abortion are allowed and which are not.

More importantly, the “viability line” test is completely contradictory to how we typically think about our moral obligations and responsibilities to other people. When we look at a mother’s ethical responsibility to her children, which child does she owe more to: her newborn daughter or her nineteen-year-old son? Most people, using common moral reasoning would say that the mother has a stronger responsibility to care for her newborn daughter since she is more helpless, fragile, and dependent upon her mother for safety, food, and care. While a mother will always feel a deep sense of obligation to her adult son, that responsibility is lighter since he is more independent, can fend for himself, and is expected to be more self-reliant. The “viability line” that SCOTUS drew in *Casey* says the opposite. SCOTUS claimed that a mother (and a state) has a lesser moral obligation to those who are more helpless and reliant upon others. If a child is viable and can theoretically survive outside the womb on their own then, yes, a state can ban the violence of abortion against that preborn child. However, under *Casey* if that child in the womb is not viable and at a stage of devel-

opment where she is most dependent upon her mother for her life, nutrition, and safety, then states are prohibited from banning abortion and protecting her. This is moral absurdity.

This is why we celebrated SCOTUS looking directly at “whether all pre-viability prohibitions on elective abortions are unconstitutional.” With *Dobbs*, the Pro-Life movement has the chance to argue SCOTUS should throw out this irrational legal justification for stopping states from passing and enforcing strong Pro-Life laws that would protect preborn children before and after the point of viability.

Dobbs v. Jackson could be the case to dismantle *Roe v. Wade* and allow state legislatures to protect preborn children. During the arguments, several justices signaled their willingness to do just that. When Mississippi finally made their oral arguments before the court, they boldly and unapologetically advocated for a wholesale reversal of *Roe* and *Casey*.

In response, the abortion industry defended the substance of *Roe* but also emphasized the need to respect the precedent of the court’s prior decisions. The court’s three liberal justices spent their time suggesting *Roe* is too entrenched, and the abortion issue too political, to reverse the decision. Justice Sonia Sotomayor conceded the Constitution does not expressly mention many of the court’s protected rights but nonetheless concluded the court is the final arbiter on these matters. This assertion is, unsurprisingly, an implicit biased endorsement of judicial supremacy. Justice Elena Kagan, for her part, spent no time defending *Roe* on the merits. Instead, she concentrated her questions on the importance of respecting precedents.

The conservative justices were openly critical of the viability logic and discussed reasons the court may use to break with erroneous prece-

dent. Justice Kavanaugh, who many believe is the swing justice on the court asked “abortion appears nowhere in the Constitution’s text, history, or tradition. So wouldn’t the court’s most neutral action be to let the legislatures decide?” A neutral ruling, Justice Kavanaugh seemed to imply, is to reverse *Roe* and take abortion policy out of the courts. This would mean allowing individual states to determine how far they want to go to protect innocent human life.

While Pro-Lifers were ultimately encouraged by the tone of the arguments before SCOTUS in December 2021, we will not officially know their ruling in *Dobbs* until the summer of 2022. For now, the abortion-industry is preparing as if *Roe* will finally fall. Accordingly, the left has flooded headlines, news coverage, op-eds, and social media with unsurprising “the sky is falling” rhetoric. However, a Post-*Roe* world is not as apocalyptic as the abortion industry makes it sound. In fact, we have already had a glimpse of what will happen if *Roe* and *Casey* are officially overturned. Just look at Texas.

The Texas Heartbeat Act

On September 1, 2021 something that has not happened since 1973 occurred: a Pro-Life law protecting children as early as six-weeks gestation was enforced and the abortion industry was forced to comply. That was the date that the Texas Heartbeat Act went into effect and around one hundred preborn Texans were spared from the violence of abortion and Texas mothers were directed to more life-affirming options.

In 2021, the Texas State Legislature passed Senate Bill 8, the Texas Heartbeat Act, with bipartisan support. The policy bans elective abortions after the preborn child’s heartbeat is

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detectable, which typically occurs around six weeks' gestation. Breaking from the model of a dozen other states that had passed similar laws before, SB 8 is only enforceable through private civil action. This means that all state officials and law enforcement are prohibited from taking any action against the abortion industry if they have reason to believe the law was broken. However, when anyone violates the law by performing, aiding, or abetting an abortion after six weeks, a private citizen may sue the abortionist or abortion industry to enforce the law. This unique enforcement mechanism ended up preventing the abortion industry from successfully challenging the bold Pro-Life law in court.

While the abortion industry filed a flurry of legal challenges (including 14 cases against me personally and Texas Right to Life), and they took those challenges all the way before SCOTUS, the law remained in effect

saving lives in Texas daily since September. The state of Texas has been successful in defending the law, however some legal challenges remain unresolved and will continue into 2022.

The biggest lesson in Texas in 2021 for the Pro-Life movement was that Texas was effectively a preview of what a post-Roe world will look like. Texas had four months where 90% of elective abortions were effectively prohibited and stopped, according to the abortion industry themselves. The Texas Pro-Life movement, including adoption agencies, pregnancy centers, maternity homes, and other activists have been functioning in a virtually abortion-free state for a quarter of 2021. The sky has not fallen. The prospect of a *Roe* being overturned by *Dobbs* has raised concerns that we may have abortion-free states soon, but we do not have pro-women states ready to step up to serve. However, Texas has proven this talking point

wrong. The Pro-Life movement has risen to the occasion in Texas, not just banning abortions but coming alongside women facing unexpected and difficult pregnancies.

One of the ways Texas stood up for women, not just preborn children, was to dedicate over \$100 million dollars in the state budget for the "Alternatives to Abortion" program that funds a statewide network of social services for new and expecting parents. Counseling, parenting training, job and life skills classes, and material assistances are all reimbursable services to approved providers under the program. The Texas Alternatives to Abortion program is the largest and most successful state-funded, life-affirming program in the United States. While Pro-Lifers must continue to find new and innovative ways to support women when abortion is not a legal option, Texas shows we are ready for the challenge. 

TOP FIVE ANTI-FAMILY EVENTS

by Stefano Gennarini, J.D., Center for Family & Human Rights, www.c-fam.org

Here are the five worst things that happened last year as the sexual left tried to use the great reset to build the world back "better."

1 President Biden Becomes First U.S. President to Back Abortion as a Human Right

As president, the self-professed devout Catholic showed just how radically pro-abortion he is. He ordered the federal government to fund abortion groups overseas and promised pro-abortion countries in the Human Rights Council that he'd repeal and undermine the Helms amendment. Even Barack Obama and Bill Clinton rejected any international obligation to allow or fund abortion.

2 United Nations Approve Strategic Plans with Abortion

and LGBT Agenda

The pressure from the Biden administration and the European Union was just too much for traditional countries to block the terms "sexual orientation and gender identity" and "sexual and reproductive health and rights". The controversial terms were adopted for the first time in U.N. agency strategic plans. The inclusion of the terms in the strategic plans of the U.N. agencies for children, women, and population control will now give U.N. agencies cover to promote abortion and the LGBT agenda with impunity.

3 U.N. Unanimously Adopts Resolution with "Sexual Orientation and Gender Identity"

Support for the LGBT agenda has steadily grown internationally. Tradi-

tional countries are no longer willing to block the terms when other political priorities are at stake.

4 Mexican Supreme Court Declares Right to Abortion

A political change in the composition of the court flipped it unanimously in favor of abortion. For Catholics, the Marian apparition of Our Lady of Guadalupe, greatly revered in Mexico and in all the Americas, is considered the patron saint of the unborn.

5 European Union Launches All-out Attack on Poland and Hungary Because of their Pro-Life and Pro-Family Policies

The EU Commission withheld COVID-19 recovery funds to the two Central European Countries, though they borrowed the funds with other EU member states. The EU Commission even initiated proceedings with the European Court of Justice to punish Poland and Hungary. 

BIDEN PROMOTES DIY ABORTIONS

by Colleen Holcomb, President of Eagle Forum.

Since its inception, Eagle Forum has been committed to defending human life, born and unborn. Being pro-life has always meant opposing anti-life policy practices like expanding abortion and euthanasia, and at the same time defending our national security, our constitutional freedoms and fighting all policies that devalue human life.

As a recent guest on our Engage with Eagle Forum podcast noted, being pro-life means that it's not enough to just be "pro-birth," but we must be pro "abundant life," fighting for life-affirming policies that promote opportunities, hope, and empower communities to assist mothers and fathers in need.

Since the Supreme Court's 1973 decision in *Roe v. Wade*, the pro-life community has worked tirelessly to fight abortion on many fronts, including telling the truth about the ugliness of abortion: Abortion harms women. Unborn children feel pain. The abortion industry is racist, explicitly targeting black children for elimination. Abortion stops a beating heart.

Throughout the nearly forty-nine-year-long reign of *Roe*, technology has been instrumental in illustrating the truth about abortion. Developing technology made unborn children's humanity undeniable, and it has enabled the public to witness the violent and painful realities of the procedure. But, just as technology seemed certain to seal *Roe*'s demise in 2021, other technological advances threaten to further expand and "normalize" abortion.

The pro-life community is rejoicing that the Supreme Court has an opportunity to overturn *Roe v. Wade*, by upholding a Mississippi law that

bans abortion after fifteen weeks in the *Dobbs v. Jackson Women's Health Organization* case. This law is based on the understanding promoted by current technology that at fifteen gestational weeks, an unborn child can feel pain.

While we will not know exactly how abortion policy will change until the Court announces its decision this summer, Supreme Court experts have indicated that there is great cause for optimism for pro-life Americans. Yet, while pro-life

Americans embraced this new hope, the Biden Administration took a giant leap toward expanding the very definition of abortion on demand.

On December 16, 2021, just two weeks after oral arguments in *Dobbs*, the Biden Administration's FDA quietly indicated through a mere website change that it would allow abortion-inducing drugs to be distributed via mail, removing the long-standing requirement that the drugs be dispensed by qualified health care providers.

The precedent for this dangerous practice was set in 2020, when several medical groups filed suit, and a Maryland federal district court judge allowed patients to bypass medical professionals and receive abortion drugs by mail during Covid-19 shutdowns. However, the Trump Administration challenged this decision, and the Supreme Court reinstated the requirement that the drugs be dispensed by medical professionals. Now, the Biden FDA has administratively in-

stituted at-home, do-it-yourself abortions. This policy strengthens the abortion industry's lie that abortion is no big deal. Any woman who has undergone a miscarriage knows that this is a horrifically anti-woman policy, as,

John 10:10

The thief comes only to steal, kill and destroy. I came that they might have life and have it abundantly.

even early on, and even if there are no complications, the process of losing a pregnancy is physically, mentally and emotionally excruciating.

Clearly, there is much work to be done to protect women and defend the unborn!

Every year in January, Eagle Forum acknowledges the anniversary of *Roe v. Wade* by renewing our commitment and our call to each of you to continue the fight for unborn life. We pledge to continue our unwavering effort to bring you the best information available to equip you to fight abortion, defend life, and to promote policies that foster the abundant life Jesus promised. 

EAGLE FORUM

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Yearly membership \$25.00

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