JUST SAY NO TO SEX: HOW THE *DOBBS* DECISION TO PROTECT POTENTIAL LIFE HAS THREATENED AND MAY YET END A WOMAN'S—AND A MAN'S—RIGHT TO CHOOSE

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INTRODUCTION

In every state, women and men consider whether and when to have children. Millions of women use contraceptive drugs, and women and men both have relied on surgical procedures to execute their decisions, at least up until now.[1] More than three years have passed since the United States Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, holding that "the Constitution does not confer a right to abortion."[2] The decision sent shockwaves through the country, affecting women seeking abortion care and physicians who provide that care. States have passed laws or have resurrected long-dormant ones that ban or limit access to abortion. What has emerged in the years that have followed the decision, and what this Article considers, is the serious threat that physicians face when trying to care for pregnant women and the harm that pregnant women have suffered and will continue to suffer as a result of the state laws now controlling. *Dobbs* also poses a threat to other rights, like the right to access and use contraception, that are entrenched in Americans' lives.

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1. Dima M. Qato et al., *Use of Oral and Emergency Contraceptives After the U.S. Supreme Court's Dobbs Decision*, JAMA NETWORK (June 26, 2024), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2820370 (studying over 143 million prescriptions dispensed from March 2021 through October 2023).

2. 597 U.S. 215, 292 (2022).

The *Dobbs* Court, in returning the authority to regulate abortion to the states, justified its decision on the fact that abortion terminates "potential life."[3] The Court observed that nowhere in the Constitution is the word "abortion" mentioned and the right to it was not "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty."[4] Because abortion "presents a profound moral issue on which Americans hold sharply conflicting views,"[5] the Court decided that the only way to regulate it is to return the authority to the states.[6] Importantly, however, the Court has previously protected other rights, like the right to marry, engage in sexual relations with the person of one's choice, and access and use contraceptives; even though these rights may be described exactly as the Court described the right to abortion.[7] They are not mentioned in the Constitution, had no historical underpinnings when the Court decided they were protected by the Constitution, and just like abortion, involve issues "on which Americans hold sharply conflicting views."[8] Indeed, the *Dobbs* Court's decision to return the issue of abortion "to the people's elected representatives" because it is so controversial directly contradicts the Court's previous acknowledgment to the contrary—that rights that are controversial "may *not* be submitted to a vote; they depend on the outcome of *no* elections."[9] Although the Court distinguished abortion from these other rights, nothing suggests that it will hesitate to reconsider its previous protection of these rights.[10]

Indeed, the Supreme Court has already considered two such cases. One case challenges the availability of the widely-used abortion drug, mifepristone.[11] And another challenges a state's ban on abortion when it threatens the life of the mother and conflicts with federal law requiring her

3. *Id.* at 383.

4. *Id.* at 231.

5. *Id.* at 223.

6. *Id.* at 291.

7. *See* Obergefell v. Hodges, 576 U.S. 644, 677 (2015) (establishing protection of the right to same-sex marriage); Loving v. Virginia, 388 U.S. 1, 2 (1967) (recognizing the constitutional right to interracial marriage); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (recognizing the right for married person to use birth control). In his concurring opinion, Justice Thomas called for these protected rights to be brought back before the Court so the Court could apply the *Dobbs* history and tradition framework to reexamine these rights and "*any* rights besides those enumerated in the Constitution." *Dobbs*, 597 U.S at 333 n.22 (Thomas, J., concurring) (emphasis added).

8. *Dobbs*, 597 U.S. at 223 (majority opinion).

9. *Obergefell*, 576 U.S. at 677 (emphasis added) (quoting W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943)).

10. *See Dobbs*, 597 U.S. at 333 (2022) (Thomas, J., concurring) (calling for a review of the decisions protecting these rights).

11. Food & Drug Admin. v. All. for Hippocratic Med., 602 U.S. 367, 372–76 (2024).

to receive emergency treatment, which might include terminating her pregnancy.[12] The Court dismissed both cases for different reasons but invited further challenge to both issues and offered no guidance on how far a state may go to regulate abortion even when that regulation might conflict with federal law.[13] *Dobbs* has also invited challenges to in vitro fertilization and access to contraception to prevent pregnancy in the first place. Because the Court justified its decision on the protection of "potential life," without balancing it against a woman's right of any kind or defining what those words mean, the decision's impact has far-reaching implications.[14] In light of the Court's very broad language, there is nothing to stop a state from regulating the very process of fertilization or, to state it more directly, to limit access to contraceptive medication or surgical sterilization that prevents pregnancy in the first place.[15] At its core, *Dobbs* granted states the power to decide how to protect "potential life," and the Court put no limits on where that power will end or how it will affect the health of women and the welfare of both men and women who may or may not want children.[16]

To understand *Dobbs* and the threats that it poses, Part I of the Article reviews the basis for the Court's decision. Part II considers the threat to other rights that that the Supreme Court has deemed fundamental at least until now. Part III addresses how the Court's concern for protecting "potential life" has already imposed a great cost on women's health and the ability for women to obtain the health care they need and may affect the right of both women and men to access the contraception they depend on to control how many children they have. This Article concludes that *Dobbs* may reach well beyond abortion rights to restrict or ban access to contraceptive drugs or procedures and, therefore, as the states exercise their power given to them by *Dobbs*, the only way to control whether to have children may well be to just say no.

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12. Moyle v. United States, 603 U.S. 324, 325–27 (2024).

13. *Food & Drug Admin.*, 602 U.S. at 395–97 (dismissing the case on standing grounds but inviting plaintiffs, who do prescribe it or use it, to challenge the drug's availability and use); *Moyle*, 603 U.S. at 324 (dismissing the case for having improperly granted certiorari and sending the case back to the state court).

14. *Dobbs*, 597 U.S. at 273 (distinguishing the issue before it from other cases because of its "effect on . . . potential life").

15. *See* Lauren Weber, *Conservative Attacks on Birth Control Could Threaten Access*, WASH. POST (June 5, 2024), https://www.washingtonpost.com/health/2024/06/05/birth-control-access-abortion-ban (noting that anti-abortion activists and conservative lawmakers are "conflating some forms of birth control with abortion," and "trying to redefine when life begins").

16. *Dobbs*, 597 U.S. at 219 (quoting Roe v. Wade, 410 U.S. 113, 163 (1973)) (noting the "glaring deficiency" of the Court, in that case, to draw a distinction between pre- and post-viability in deciding when a state's interest becomes compelling but offering no alternative).

I. THE *DOBBS* DECISION AND ITS PROTECTION OF "POTENTIAL LIFE"

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court held that "the Constitution does not confer a right to abortion" and that "the authority to regulate abortion must be returned to the people and their elected representatives."[17] The Court asked what it called "the critical question whether the Constitution, properly understood, confers a right to obtain an abortion."[18] Starting with "the language of the instrument,"[19] the Court noted that the Constitution "makes no express reference to a right to obtain an abortion,"[20] but acknowledged that the Due Process Clause of the Fourteenth Amendment protects "some rights that are not mentioned in the Constitution."[21] Those rights, however, are only those that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[22]

To decide whether the right to abortion is deeply rooted in this country's history, the Court traced the history of abortion back to English cases from the 13th century and noted that at that time it was considered a crime.[23] It also cited an English indictment from 1602, which described abortion as "pernicious" and "against the peace of our Lady the Queen, her crown and dignity."[24] Examining how abortion was treated in this country, the Court noted that the treatment was similar to and rested on English law.[25] It cited a case from Maryland, decided in 1652, in which a man was charged with attempting to murder both the mother and the child "begotten in the Womb."[26] The Court also observed that abortion was considered a crime in the 19th century, noting that "courts frequently explained that the common law made abortion of a quick child a crime."[27]

Noting the distinction between "pre- and post-quickening abortions," the Court dispensed with the issue of when a fetus is viable as being "of

17. 597 U.S. 215, 292 (2022).

18. *Id.* at 234.

19. *Id.* at 235 (quoting Gibbons v. Ogden, 22 U.S. 1, 71 (1824)).

20. *Id.* at 231.

21. *Id.*

22. *Id.* at 231 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal quotation marks omitted)).

23. *Id.* at 242.

24. *Id.* at 244 (quoting JOHN KEOWN, ABORTION, DOCTORS AND THE LAW 7 (Cambridge Univ. Press 1988)).

25. *Id.* at 245.

26. *Id.* at 246 (quoting Proprietary v. Mitchell, 10 Md. Archives 80, 183 (1652) (W. Browne ed. 1891)).

27. *Id.*

little importance."[28] Preliminarily, it noted that the reason for making that distinction was "not entirely clear,"[29] but that it may have been because there was no scientific way to detect that a woman was pregnant in the early stages of her pregnancy.[30] It quoted an 1872 decision from New York in which the court noted that "until the period of quickening there is no *evidence* of life."[31] It also cited a decision in which a New Jersey court contemplated when life begins, deciding that it did "at the moment of quickening, at that moment when the embryo gives *the first physical proof of life*, no matter when it first received it."[32]

While the question of when life begins is of considerable significance, which will be discussed in the following Part, the Court relied on these early cases to support its conclusion that the right to an abortion is not "deeply rooted in the Nation's history and traditions."[33] By 1868, the year the Fourteenth Amendment was ratified, the Court pointed out that "three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening,"[34] and that trend continued. Relying on the *Roe* Court's "own count,"[35] the *Dobbs* Court noted that by the 1950s, all states, except four and the District of Columbia, prohibited abortion "however and whenever performed, unless done to save or preserve the life of the mother,"[36] and that "overwhelming consensus endured until the day *Roe* was decided."[37]

Based on this history, the Court arrived at what it called the "inescapable conclusion" that a right to abortion is "not deeply rooted in the Nation's history and traditions."[38] In fact, according to the Court, "an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted since the earliest days of the common law until 1973" when the Court decided *Roe*.[39] Noting that *Roe* discerned a "trend toward liberalization" in about "one-third of the States," the *Dobbs* Court pointed out that even in those states some abortions were still crimes and "regulated

28. *Id.* at 247.
29. *Id.* at 246.
30. *Id.*
31. *Id.* at 246–47 (quoting Evans v. People, 49 N.Y. 86, 90 (N.Y. 1872) (emphasis added by the *Dobbs* Court)).
32. *Id.* at 247 (quoting State v. Cooper, 22 N.J.L. 52, 56 (N.J. 1849) (emphasis added by the *Dobbs* Court).
33. *Id.* at 250.
34. *Id.* at 248.
35. *Id.* at 249.
36. *Id.* (quoting Roe v. Wade, 410 U.S. 113, 139 (1973)).
37. *Id.*
38. *Id.* at 250.
39. *Id.*

them more stringently than *Roe* would allow."[40] Thus, as noted by the *Dobbs* Court, even the *Roe* decision itself "convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people."[41]

The Court also addressed whether the right to abortion is implicit in "our Nation's concept of ordered liberty."[42] Asking first "what the *Fourteenth Amendment* means by the term 'liberty,'"[43] the Court warned "against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy."[44] To avoid this, the Court noted "the 'appropriate limits' imposed by 'respect for the teachings of history,'"[45] and decided that it was "clear" that "the Fourteenth Amendment does not protect the right to an abortion."[46] The Court, in fact, noted not only that it was "aware of no common-law case or authority," but also that "the parties have not pointed to any, that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy."[47]

The Court also rejected the idea, recognized by both *Roe* and *Casey*, that "the abortion right is an integral part of a broader entrenched right."[48] As noted by the *Dobbs* Court, *Roe* referred to this right as the "right to privacy."[49] The *Casey* Court described this right as the freedom to make "intimate and personal choices" that are "central to personal dignity and autonomy."[50] Quoting the *Casey* Court's description of the right to abortion as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life,"[51] the *Dobbs* Court was quick to limit this right. The Court stated that while "individuals are certainly free *to think* and *to say* what they wish about 'existence,' 'meaning,' the 'universe,' and 'the mystery of human life,' they are not always free *to act* in accordance with those thoughts."[52]

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40. *Id.* (quoting *Roe*, 410 U.S. at n.37).

41. *Id.* (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 793 (1986) (White, J., dissenting)).

42. *Id.* at 242.

43. *Id.* (emphasis in original).

44. *Id.* at 239.

45. *Id.* at 240 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1932) (internal quotation marks omitted)).

46. *Id.*

47. *Id.* at 245.

48. *Id.* at 255.

49. *Id.* (citing Roe v. Wade, 410 U.S. 113, 154 (1973)).

50. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

51. *Dobbs*, 597 U.S. at 255 (quoting *Casey*, 505 U.S. at 851).

52. *Id.*at 255–56 (emphasis in original).

Instead, according to the *Dobbs* Court, there must be a "boundary between competing interests."[53] Those interests, identified by *Roe* and *Casey*, are "the interests of a woman who wants an abortion and the interests of what they termed 'potential life.'"[54] The Court, however, refused to define how those interests should be balanced, noting only that "the people of the various States may evaluate those interests differently"[55] and, therefore, decided that the balance could be struck by the states.[56] The Court made its position clear from the outset of its opinion:

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. That is what the Constitution and the rule of law demand."[57]

II. FINDING NO CONSTITUTIONAL RIGHT TO ABORTION, THE *DOBBS* COURT HAS LAID THE GROUNDWORK TO OVERRULE PREVIOUS DECISIONS THAT PROTECT OTHER FUNDAMENTAL RIGHTS

The *Dobbs* Court justified its decision to withdraw constitutional protection of abortion because it was not mentioned in the Constitution, did not have a long history of protection, and the decision to protect it 50 years ago was "egregiously wrong."[58] Since abortion "presents a profound moral issue on which Americans hold sharply conflicting views,"[59] the Court announced that the decision whether to allow it should be left to a vote of the majority, encouraging people to "persuade one another" on the issue, because that is "what the Constitution and the rule of law demand."[60] This conclusion, however, directly contradicts what the Court observed in 2015 in *Obergefell v. Hodges*, when it decided that the Constitution protected an individual's right to marry someone of the same sex.[61] In *Obergefell*, the Court emphasized that "fundamental rights may not be submitted to vote;

53. *Id.* at 256.

54. *Id.* (quoting *Roe*, 410 U.S. at 150).

55. *Id.*

56. *Id.* ("Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.").

57. *Id.* at 232 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852, 979 (1992) (Scalia, J., concurring in judgment in part and dissenting in part)).

58. *Id.* at 231.

59. *Id.* at 223.

60. *Id.* at 232.

61. 576 U.S. 644, 677 (2015).

they depend on the outcome of no elections."[62] In fact, as the Court made clear, the very "idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'"[63] Thus, an "individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act."[64]

The *Dobbs* Court did not even bother to address this inconsistency. Its decision has now laid the groundwork to overrule *Obergefell*; and also *Loving v. Virginia*, which accorded constitutional protection to the right to interracial marriage.[65] The Court premised its decisions in both *Obergefell* and *Loving* on the fact that the right to marry is a fundamental right inherent in the liberty of the person, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect this right,[66] but it did not require proof that the right at issue, in either case, was deeply rooted in history, as the *Dobbs* Court held.[67] In fact, the Court in both of the earlier cases noted that the challenged right had not been recognized before. The *Obergefell* Court noted that historically, marriage was limited to opposite-sex couples, and that the "limitation of marriage to opposite-sex couples may long have seemed natural and just," but over time, that limitation was no longer acceptable.[68] In *Loving*, the Court noted that interracial marriage had been viewed as a crime "traditionally . . . subject to state regulation without federal intervention,"[69] just as abortion had been treated before the Court protected it in *Roe*.

In the same way, the Court in *Griswold v. Connecticut* recognized the right of married persons to purchase and use contraception, which had no historical underpinning,[70] and subsequently, in *Eisenstadt v. Baird*, expanded that right to unmarried couples.[71] In *Griswold*, the Court protected the right to use contraceptives, based on the "intimate relation of husband and wife and their physician's role in one aspect of that relation."[72] The Court did not base the recognition of this right on anything stated in the

62. *Id.* at 677 (quoting W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943)).
63. *Id.* (quoting *Barnette*, 319 U.S. at 638).
64. *Id.*
65. 388 U.S. 1, 2 (1967) (recognizing the constitutional right to interracial marriage).
66. *Obergefell*, 576 U.S. at 675; *Loving*, 388 U.S. at 12.
67. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 257 (2022).
68. *Obergefell*, 576 U.S. at 670–71.
69. *Loving*, 388 U.S. at 7.
70. 381 U.S. 479, 485 (1965).
71. 405 U.S. 438, 453 (1972).
72. *Griswold*, 381 U.S. at 482.

Constitution, noting the opposite—that the "association of people is not mentioned in the Constitution nor in the Bill of Rights."[73] It also did not mention the deeply rooted nature of that right but instead recognized "penumbras" that give the right to privacy "life and substance."[74] Likewise, in *Eisenstadt*, the Court recognized that right and extended it to unmarried people, without any reference to the text of the Constitution or history or tradition: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[75]

These decisions, therefore, may not withstand *Dobbs* scrutiny, as the dissenting Justices observed with regard to contraception: "The Constitution, of course, does not mention that word. And there is no historical right to contraception, of the kind the majority insists on. To the contrary, the American legal landscape in the decades after the Civil War was littered with bans on the sale of contraceptive devices."[76] Indeed, there was no historical right to same-sex intimacy and marriage or the right to marry someone of another race, although each of these rights were recognized and protected by the Court.[77] If the *Dobbs* analysis is applied to these decisions, therefore, they may be overturned.[78]

The *Dobbs* majority responded to this concern, stating that "to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right."[79] And, to emphasize this point, the Court reiterated that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[80] This reassurance, however, is inconsistent with its rationale that only rights "deeply rooted in this Nation's history" deserve constitutional protection.[81] Proof of this inconsistency, or "hypocrisy" as

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73. *Id.*

74. *Id.* at 484 (explaining the right is not deeply rooted in our Constitution, but it partially extends that right to privacy).

75. *Eisenstadt*, 405 U.S. at 453.

76. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 386 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting).

77. *See* Obergefell v. Hodges, 576 U.S. 644, 671–72 (2015) (protecting same-sex marriage); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (protecting the right to engage in same-sex intercourse); Loving v. Virginia, 388 U.S. 1, 2 (1967) (protecting interracial marriage); *see also* Griswold v. Connecticut, 381 U.S. 479, 480 (1965) (protecting the right to use contraception).

78. *See Dobbs*, 597 U.S. at 363 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

79. *Id.* at 290 (majority opinion).

80. *Id.*

81. *Id.* at 231 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal quotation marks omitted).

the dissenting Justices called it,[82] is most apparent in Justice Thomas's concurrence, when he stated that he joined in the decision of the majority "because it correctly holds that there is no constitutional right to abortion."[83] However, he stated explicitly that the reason the Court did not examine the rights to contraception, same-sex marriage, and intimacy was because these issues were not before the Court.[84] Identifying *Griswold* and *Obergefell* by name, Justice Thomas called for the Court to reconsider them and, when they are reconsidered, he made explicitly clear that they should be overruled.[85]

Even without an explicit promise to overrule the cases from the other Justices in the majority, "no one should be confident that this majority is done with its work," as the dissenting Justices warned.[86] In fact, as those Justices observed, the "right to terminate a pregnancy arose straight out of the right to purchase and use contraception."[87] Those rights then "led, more recently, to rights of same-sex intimacy and marriage."[88] Emphasizing that the basis for the majority's opinion was the fact that the right to an abortion was not "deeply rooted in history," the dissenting Justices observe that "the same could be said" for the right to contraception and the right to marry the person of one's choice.[89] In fact, as the dissenting Justices concluded: "Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat."[90]

To support their assurance that the *Dobbs* analysis affects only abortion, the Justices joining the Court's majority differentiated abortion from other rights because, unlike all other rights, abortion destroys

82. *Id.* at 363 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

83. *Id.* at 330 (Thomas, J., concurring).

84. *Id.* at 332.

85. *Id.* at 333. Justice Thomas also included *Lawrence v. Texas*, which upheld the right to engage in private, consensual sexual acts, in his list of cases that should be reexamined. *Id.* But it should not escape notice that Justice Thomas, who is the husband in an interracial marriage, did not include *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing the right to interracial marriage), when identifying cases that should be overruled. *See id.*

86. *Dobbs*, 597 U.S. at 362 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

87. *Id.* at 363 (citing Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972)).

88. *Dobbs*, 597 U.S. at 363 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (citing Obergefell v. Hodges, 576 U.S. 644, 677 (2015)); Lawrence v. Texas, 539 U.S. 558, 579 (2003)).

89. *Dobbs*, 597 U.S. at 363 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

90. *Id.*

"potential life and what the law at issue in this case regards as the life of an unborn human being."[91]

III. PROTECTING "POTENTIAL LIFE" WITHOUT DEFINING IT, THE *DOBBS* DECISION HAS ALREADY CAUSED SERIOUS HARM TO PREGNANT WOMEN AND CONFUSION OVER HOW TO PROVIDE HEALTH CARE TO THEM

By failing to define "potential life," the Court has created confusion. The confusion concerns whether its decision allows for a total ban on abortion, with no exceptions for the health or life of the mother; the health of the fetus; or the eventual life of the fetus after birth. The Court has invited challenges to rights beyond abortion, including access to in vitro fertilization that creates life and birth control that interferes with the fertilization process or prevents fertilization in the first place. Unlike *Roe v. Wade*[92] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[93] the *Dobbs* Court described pregnancy with a broad brush, emphasizing its "respect for and preservation of prenatal life"[94] but not defining what "prenatal life" is, when it begins, or "if and when prenatal life is entitled to any of the rights enjoyed after birth."[95] To the contrary, the Court made clear that it was taking no position on "when a State should regard prenatal life as having rights or legally cognizable interests" or how those interests might be balanced against a woman's interests in her health and well-being.[96] By failing to address the competing interests that define the abortion debate, the *Dobbs* Court has sown, at the very least, confusion for pregnant women, their treating physicians, and, at the very worst, the threat that pregnant women may die.[97]

In both *Roe* and *Casey*, the Court recognized the importance of protecting an unborn fetus while nevertheless considering the interests and health of the woman carrying that fetus.[98] In *Roe*, the Court observed that:

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91. *Id.* at 257 (majority opinion) (internal quotation marks omitted).

92. 410 U.S. 116 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

93. 505 U.S. 833 (1992), *overruled by Dobbs*, 597 U.S. at 215.

94. *Dobbs*, 597 U.S. at 301.

95. *Id.* at 263.

96. *Id.* at 254.

97. *See infra* notes 150–69 and accompanying text discussing State v. Zurawski, 690 S.W.3d 644, 653–54 (Tex. 2024), and the evidence in that case how women suffered as a result of the confusion surrounding the State's abortion law.

98. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 254 (2022); Roe v. Wade, 410 U.S. 113, (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.[99]

The *Casey* Court also recognized that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[100]

Relying on medical evidence as it existed at the time, the Court in *Roe* decided the State's interest in the health of the mother arises at the end of the first trimester.[101] Prior to that time, a physician, in consultation with his or her patient, was able to decide to terminate a pregnancy "free of interference by the State."[102] The Court identified the State's interest at the end of the first trimester to regulate "the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[103] Ultimately, when the fetus was viable, the Court held that the State "may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."[104] The Court drew the line at viability because "the fetus then presumably has the capability of meaningful life outside the mother's womb."[105] The *Casey* Court did not divide a pregnancy into trimesters as the *Roe* Court did; instead, it drew the line at the point of viability of the fetus.[106]

Explicitly noted by the *Dobbs* Court, *Casey* recognized that "[a]bortion is a unique act."[107] The *Casey* Court also recognized that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[108] But, unlike *Dobbs*, *Casey* recognized that "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."[109] Thus, the *Casey* Court struck a balance between a woman's

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99. *Roe*, 410 U.S. at 159.
100. *Casey*, 505 U.S. at 846.
101. *Roe*, 410 U.S at 163.
102. *Id.*
103. *Id.*
104. *Id.* at 163–64.
105. *Id.*
106. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
107. *Dobbs*, 590 U.S. at 290 (quoting *Casey*, 505 U.S. at 852).
108. *Casey*, 505 U.S. at 846.
109. *Id.*

right to elect an abortion and the state's interest in protecting the life of a fetus—and drew the line at viability.[110] The Court drew the line there because at that point "there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman."[111] But even with that line drawn, the *Casey* Court made clear, just as the *Roe* Court did, that even after viability, the state's interest in preserving the life of the fetus should not be at the cost of the mother's health or life.[112] In the Court's words, "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother*."[113]

Returning the decision-making to the States, the *Dobbs* Court did not draw any line at trimesters or before and after viability. Nor did it require the states to consider the mother's health or life at all but instead, proclaimed that it was taking no "view about when a State should regard prenatal life as having rights or legally cognizable interests."[114] In his concurring opinion, Justice Kavanaugh endorsed the Court's approach as appropriately "neutral," observing that the Constitution is "neither pro-life nor pro-choice," and, therefore, that the Court also must be "scrupulously neutral."[115] Noting that Supreme Court Justices are not elected to their positions, Justice Kavanaugh opined that they, therefore, "do not possess the constitutional authority to override the democratic process and to decree either a pro-life or a pro-choice abortion policy for all 330 million people in the United States."[116] However, as the dissenting Justices pointed out, by refusing to strike a balance between a woman's right to elect an abortion and the government's interest in protecting life, however that word is defined, the Court decided to take away the right women have enjoyed for 50 years and, rather than being neutral, the Court was "taking sides: against women who wish to exercise the right, and for States . . . that want to bar them from doing so."[117] The majority of the Justices were very clear that States have a "legitimate" interest in the "respect for and preservation of

110. *Id.* at 870.
111. *Id.*
112. *Id.* at 879.
113. *Id.* (quoting Roe v. Wade, 410 U.S. 113, 164–65 (1973)) (emphasis added).
114. Dobbs v. Jackson Women's Health Org., 597U. S. 215, 254 (2022).
115. *Id.* at 338 (Kavanaugh, J., concurring).
116. *Id.*
117. *Id.* at 341 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

prenatal life at all stages of development"[118] and that however a State decides to handle abortion, that decision will be "entitled to a 'strong presumption of validity.'"[119] In this way, the Court cleared the path for States to bar any right to abortion, leading to the inescapable conclusion that "from the very moment of fertilization, a woman has no rights to speak of."[120]

Before addressing how the decision has impacted and will continue to impact women's health and lives, it must be noted that *Dobbs* immediately created confusion and uncertainty that has prevented physicians from providing the health care that pregnant women need.[121] In Arizona, for example, this uncertainty was glaring after a law banning abortion, enacted in 1864 but dormant after *Roe v. Wade*, was resurrected when *Roe* was overturned.[122] After *Dobbs*, Arizona lawmakers attempted to repeal its 1864 law and replace it with a 15-week ban.[123] However, the Supreme Court of Arizona struck down the new law and held that the state legislature's repeal of the 1864 law was ineffective and, therefore, that the 1864 ban, which "has never been repealed and, following *Dobbs*, should be given effect."[124] The Arizona Court also held, however, that parts of the new law were enforceable and that both statutes had to be read together to understand what was proscribed and what was allowable.[125] As a result of

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118. *Id.* at 301 (majority opinion).

119. *Id.* at 301 (dissent) (internal quotation omitted).

120. *Id.* at 359 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

121. *See* Stacy Weiner, *The Fallout of Dobbs on the Field of OB-GYN*, AAMC, https://www.aamc.org/news/fallout-dobbs-field-ob-gyn (last visited on May 11, 2025) (quoting one doctor who left her practice in a state limiting access to abortion because "[d]octors are trying to apply legal wording that is not clinical to clinical situations . . . . How can I know when someone is close enough to death that it's okay to help them? What if I wait too long and then face a malpractice suit?"). In addition to malpractice suits, a physician might face jail. For example:

> [A] person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless it is necessary to save her life, shall be punished by imprisonment in the state prison for not less than two years nor more than five years.

ARIZ. REV. STAT. ANN. § 13-3603 (2024). This uncertainty is not limited to Arizona. *See infra* notes 141–42.

122. *See* Planned Parenthood Ariz., Inc. v. Mayes, 545 P.3d 892, 896 (Ariz. 2024); *reconsideration denied*, No. CV-23-0005-PR, 2024 WL 2215834 (Ariz. Apr. 26, 2024) (examining the history of the 1864 law).

123. *See* ARIZ. REV. STAT. ANN. § 36-2322 (banning abortions after 15 weeks with limited exceptions).

124. *Planned Parenthood Ariz.*, 545 P.3d at 902.

125. *Id.* at 904. As explained by the Arizona court, certain parts of the new law, including:

the decision, the current state of the law in Arizona is not only confusing, it is also in flux. The Court remanded the case to the trial court and stayed enforcement of the 1864 law "to permit the parties, on remand, to determine whether to pursue remaining issues raised in the trial court and, if so, to request further stay relief at the trial court's discretion."[126]

The *Dobbs* decision and, with it, the Arizona court's decision, have created so much confusion that the State's Attorney General publicly recognized the confusion and the possibility that the law could change, stating on the state's website that: "Several of Arizona's abortion laws, as well as some federal laws, are being litigated in the courts right now, so the law might change in the coming months and years."[127] It is so confusing, in fact, that the Attorney General has invited Arizona citizens to "[b]ookmark" the webpage "for continued updates or sign up for email updates."[128] While the law remains in flux, the Attorney General has assured Arizonans that they are still able to obtain, and providers cannot be prosecuted for, providing abortion care, up to 15 weeks into a pregnancy.[129] The Attorney General has warned the state's physicians, however, that "Arizona law makes it a crime for a doctor to knowingly perform an abortion that is sought solely because of a genetic abnormality of the fetus," but again admits that the "meaning and application of that law is not clear and it is still being litigated in court."[130]

The Arizona Attorney General recognized that the confusion goes beyond just abortion, assuring the citizens of the state that, at least for now, they may continue to use contraception without fear of reprisal.[131] Perhaps because of a current challenge to the availability of the abortion drug, mifepristone,[132] which is widely used as contraception, the Attorney

> [L]icensing requirements, A.R.S. § 36-449.02, reporting requirements, A.R.S. §§ 36-2161 to -2164, and emergency consent requirements, A.R.S. § 36-2153(C), may apply to abortions necessary to save a woman's life. Moreover, other statutory provisions such as A.R.S. § 36-2302, which proscribes, subject to statutory exceptions, "use of a human fetus or embryo . . . [resulting from an abortion] for animal or human research," remain relevant because they may implicate all abortion-related activity.

Id.

126. *Id.* at 908.

127. *Arizona Abortion Laws*, ARIZ. ATT'Y GEN.: KRIS MAYES, https://www.azag.gov/issues/reproductive-rights/laws (last visited May 11, 2025).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* (making clear that its definition of abortion does not include the use of birth control devices, oral contraceptives that "inhibit or prevent ovulation," or oral contraceptives that "inhibit or prevent conception, the implantation of a fertilized ovum in the uterus").

132. *See* Food & Drug Admin. v. All. for Hippocratic Med., 602 U.S. 367, 372–76 (2024).

General specifically identified it and assured the citizens of the state that it "remains legal in Arizona."[133] Mifepristone is a drug that was approved in 2000 by the Food and Drug Administration (FDA) for medical termination of pregnancy.[134] From the time of its approval through 2022, more than six million women used the drug to terminate their pregnancies.[135] When the drug was first approved, the FDA approved it for use through seven-weeks gestation, and then in 2016 extended that period to ten weeks.[136] At the same time, the FDA extended the authority to prescribe the drug beyond physicians to other healthcare providers who meet certain qualifications, including pharmacists and nurse practitioners who have been certified by the FDA.[137] The FDA also reduced the number of times a patient had to see her doctor from three to only a single visit to receive the drug.[138] In 2021, the FDA again relaxed the requirements for dispensing the drug, no longer requiring a patient to see her healthcare provider in person and allowing the drug to be dispensed through the mail.[139] Since its approval, the drug has proven to be a safe way to terminate pregnancy, causing very few "serious adverse events" and, according to the FDA, by the end of 2022, only 32 women have died out of the 5.9 million women who used it.[140]

Despite the drug's proven safety record and wide use, it has been the subject of controversy recently addressed by the United States Supreme Court.[141] In *FDA v. Alliance for Hippocratic Medicine*, the Court recognized that the "FDA's approval and regulation of mifepristone have generated substantial controversy."[142] In that case, pro-life doctors and a pro-life association of medical providers sued the FDA for making it too easy for pregnant women to get the drug and for healthcare providers to

133. *Id.*

134. *Questions and Answers on Mifepristone for Medical Treatment of Pregnancy Through Ten Weeks Gestation*, FDA, https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation (last visited May 11, 2025) [hereinafter *Questions and Answers on Mifepristone*].

135. *Supreme Court Unanimously Preserves Access to Abortion Medication Mifepristone* PBS NEWS, https://www.pbs.org/newshour/politics/supreme-court-preserves-access-to-mifepristone#text=Morethan6millionpeople,pregnancythrough10weeksgestation (last visited May 11, 2025).

136. *Questions and Answers on Mifepristone*, *supra* note 134.

137. *Id.*; *see also All. for Hippocratic Med.*, 602 U.S. at 375–76 (noting that nurse practitioners could be certified to dispense the drug).

138. *Questions and Answers on Mifepristone*, *supra* note 134; *see also All. for Hippocratic Med.*, 602 U.S. at 375–76.

139. *Questions and Answers on Mifepristone*, *supra* note 134.

140. *Id.* (citing its summary report of adverse events reflecting data through Dec. 31, 2022).

141. 602 U.S. at 367.

142. *Id.* at 376.

prescribe it.[143] In dismissing the case, the Court noted that the plaintiffs were not the providers who prescribe the drug or the women who use it, and under Article III of the Constitution, "a plaintiff's desire to make a drug less available *for others* does not establish standing to sue."[144] The Court's opinion, however, left open the possibility for other plaintiffs, who do prescribe it or do use it, to challenge the FDA's approval of its use, and the Court explicitly invited the plaintiffs in that case to "present their concerns and objections to the President and FDA in the regulatory process, or to Congress and the President in the legislative process."[145]

For now, therefore, physicians and other healthcare providers may continue to prescribe mifepristone, at least until a plaintiff with standing may sue, but only in those states that have not banned abortion from the moment of conception or after six- or eight-weeks gestation.[146] The Court did not rule on the merits of the case, so if the proper plaintiffs challenge the FDA's approval process, the Court may yet limit the availability of the drug.[147] This uncertainty is also reflected in many of the states that have enacted laws banning or restricting abortions, but the enforcement of those laws have been stayed by various courts.[148] When and how these issues may be resolved has created such confusion that many health care providers

143. *Id.*

144. *Id.* at 374.

145. *Id.* at 397.

146. According to a New York Times report, as of February 17, 2025, 19 states have a total or near total ban on abortion and another 4 states ban it after six weeks. Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Bans Across the Country*, N.Y. TIMES, https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html (last updated Apr. 28, 2025); *see also* Julia Haynes, *Where State Abortion Laws Stand Without Roe*, U.S. NEWS (June 28, 2024), https://www.usnews.com/news/best-states/articles/a-guide-to-abortion-laws-by-state ("[I]n 27 states, access to abortion is currently limited depending on gestational age, with bans ranging from six weeks to more than 24 weeks. Abortion is almost completely banned with limited exceptions in another 14 states.").

147. Another threat to access may lie in the resurrection of a long-dormant "anti-obscenity" law originally enacted in 1873 to prohibit the transport by mail or other common carriers' "obscene" materials that include: "Every article or thing designed, adapted, or intended for producing abortion." Comstock Act, 18 U.S.C. § 1461 (1873). Although its application to restrict abortion has not yet been tested, there is currently a bill pending before the United States Senate to repeal it. *See U.S. Senator Tina Smith Unveils Legislation to Repeal the Comstock Act*, TINA SMITH: U.S. SEN. FOR MINN. (June 20, 2024), https://www.smith.senate.gov/u-s-senator-tina-smith-unveils-legislation-to-repeal-the-comstock-act.

148. *See, e.g.*, Planned Parenthood of Heartland, Inc. v. Reynolds *ex rel.* State, 9 N.W.3d 37, 44 (Iowa 2024), *reh'g denied* (Jul. 22, 2024) (reversing the trial court's stay of the state's fetal heartbeat bill); Planned Parenthood of Mont. v. State, 409 Mont. 304, 304 (2022) (affirming the district court's grant of a preliminary injunction temporarily enjoining the implementation of three laws enacted in 2021 restricting abortion services after 20 weeks); Johnson v. State, No. 18853, 2023 WL 2711603 at 1* (D. Wyo. Mar. 2023) (temporarily enjoining enforcement of Wyoming's abortion ban).

are refusing to perform abortions, as articulated by the Chief Legal Officer and General Counsel for the American College of Obstetricians and Gynecologists: The "laws are drafted in a way that is very confusing, vague, and open to interpretation. Our doctors are doctors, they're not lawyers . . . [and] without guidance from a hospital or employer, it is almost impossible for a clinician to know what the lines are."[149]

A stark example of the harsh consequences that follow from a health care provider's hesitation to provide health care that pregnant women need is captured in a case recently decided by the Supreme Court of Texas.[150] The law in Texas permits a physician to perform an abortion to save the life of the mother.[151] As observed by the State Supreme Court, a "physician cannot be fined or disciplined for performing an abortion when the physician, exercising reasonable medical judgment, concludes (1) a pregnant woman has a life-threatening physical condition, and (2) that condition poses a risk of death or serious physical impairment unless an abortion is performed."[152] Citing the statute, the court observed that "a woman with a life-threatening physical condition and her physician have the legal authority to proceed with an abortion to save the woman's life or major bodily function, in the exercise of reasonable medical judgment and with the woman's informed consent."[153] Despite this law, women who were refused care when they needed it, sued the State and alleged that physicians are "hesitant to perform abortions . . . for fear of legal consequences."[154] The Court noted this hesitation, yet showed no compassion for the women in need of care. Instead, the court observed:

A physician who tells a patient, "Your life is threatened by a complication that has arisen during your pregnancy, and you may die, or there is a serious risk you will suffer substantial physical impairment unless an abortion is performed," and in the same breath states "but the law won't allow me to provide an abortion in these circumstances" is simply wrong in that legal assessment.[155]

Whether right or wrong, physicians do hesitate to provide the care women need, and four women who were plaintiffs in the litigation attested

149. Bridget Balch, *What Doctors Should Know About Abortions in States with Bans*, AAMC NEWS (Sept. 26, 2023), https://www.aamc.org/news/what-doctors-should-know-about-emergency-abortions-states-bans.

150. *See* State v. Zurawski, 690 S.W.3d 644, 654 (Tex. 2024).

151. *Id.* at 653(citing TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b)(2) (West 2022)).

152. *Id.*

153. *Id.*

154. *Id.* at 654.

155. *Id.* at 653.

to this fact and the harm that hesitation caused.[156] One woman learned that she "was going to lose the baby with complete certainty," but her doctors "refused to perform an abortion immediately because the baby's heart was still beating."[157] Her doctors sent her home and three days later, after she developed life-threatening septic shock, they delivered her baby who was already dead.[158] As noted by the court, the woman "remained in intensive care for three days. Scarring from the infection was so severe that she required surgical reconstruction of her uterus and lost the use of one of her fallopian tubes."[159]

A second plaintiff was told by her doctors that she was pregnant with twins but that one of the fetuses suffered from a "100 percent fatal condition" that would trigger early labor and result in the death of both babies.[160] When her treating physician refused to terminate the pregnancy of the twin with the fatal condition, the woman traveled to a state where she was able to have the procedure done, which allowed her to carry the healthy twin to term.[161] A third plaintiff testified that she was 20 weeks pregnant when she learned that her baby had a fatal condition, but her physician would not perform an abortion.[162] Instead of travelling to a state where she could have gotten the care she needed, that woman carried her baby for another three months, at which time the child was born prematurely and died four hours after she was born.[163] Finally, a fourth plaintiff who was herself an obstetrician-gynecologist, learned from an ultrasound at 11 weeks that her fetus suffered from a fatal condition and, based on her training and experience, she knew that "[t]here's no chance of survival and that each day that I remained pregnant, my physical life was more and more at risk."[164] Not wanting to risk her own life by not getting the care she needed in Texas, the plaintiff traveled to another state to receive the abortion she needed.[165]

Despite this evidence painting a compelling picture that physicians are not performing abortions that women desperately need to save their lives, their health, or the life of another fetus, the Supreme Court of Texas concluded that the law is clear and does not prohibit "a life-saving

156. *Id.* at 655.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*

abortion."[166] Justice Lehrmann recognized the plaintiffs' repeated references to the "lack of clarity and to confusion among practitioners regarding the scope of the exception at issue, leading to significant chilling in the provision of medically necessary abortion."[167] However, she concurred in the decision and wistfully hoped that it "will provide physicians with much-needed guidance about what the law requires."[168] Justice Busby recognized the "confusion that currently prevails," and also concurred in the decision.[169]

The confusion that *Dobbs* has sown is not limited to the application of particular state laws. One question that has the potential to affect all states with laws that ban or restrict abortions is whether existing federal law affects the application of those laws.[170] This question arose in Idaho, which has a law stating that "every person who performs or attempts to perform an abortion . . . commits the crime of criminal abortion."[171] This law, described by the Idaho Supreme Court as a "Total Abortion Ban,"[172] criminalizes "*all* abortions" with very limited exceptions.[173] A person who is prosecuted under this law may defend himself or herself by proving that:

(1) The physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman . . . ; and

(2) The physician performed or attempted to perform the abortion in the manner that, in his good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman.[174]

According to the United States District Court for the District of Idaho, this defense offers the physician "cold comfort" because it "does not protect a physician who performs an abortion 'merely' to prevent serious harm to

166. *Id.* at 671.

167. *Id.* (Lehrmann, J., concurring) (internal quotation marks and editorial marks omitted).

168. *Id.* ("Hopefully, this will provide physicians with much-needed guidance about what the law requires.").

169. *Id.* at 676 (Busby, J., concurring).

170. *See, e.g.*, Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd (2024) (requiring emergency room physicians to screen every patient and provide the care necessary to stabilize that patient's condition).

171. Defense of Life Act, IDAHO CODE § 18-622(2) (2022).

172. Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1147 (Idaho 2023).

173. United States v. Idaho, No. 1:22-CV-00329-BLW, 2023 WL 3284977, at *1 (D Idaho 2023) (emphasis in original).

174. IDAHO CODE § 18-622(3)(a)(ii), (iii) (2022).

the patient, rather than to save her life."[175] In addition, it does not "insulate the physician from criminal *prosecution* under any circumstances," but instead "shifts the burden of proof from the prosecution to the criminal defendant to prove at trial that the abortion was necessary to prevent the death of the mother—in a sense, presuming the defendant guilty until she proves herself innocent."[176] Moreover, the physician must meet the high burden of proving that the affirmative defense should apply "by a preponderance of the evidence,"[177] and, if the accused physician cannot prove this, he or she will be convicted of "a felony punishable by a sentence of imprisonment of *no less than* two (2) years and no more than five (5) years in prison," and face the suspension or loss of his or her license to practice medicine.[178]

The Idaho Supreme Court upheld this law, finding that the "Idaho Constitution does not contain an explicit right to abortion," nor does it include "a fundamental right to abortion."[179] Before the court rendered this decision, however, the United States sued to enjoin Idaho from enforcing the ban because it conflicted with federal law.[180] Specifically, the United States argued that the state ban conflicted with the Emergency Medical Treatment and Labor Act, which requires all hospitals with emergency rooms that receive Medicare funds to "offer stabilizing treatment to patients who arrive with emergency medical conditions."[181] As defined by the statute, offering stabilizing treatment means "to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility."[182] Thus, if the state law were to go into effect, "the physician may well find herself facing the impossible task of attempting to simultaneously comply with both federal and state law."[183] The federal district court described this impossible choice in this way:

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175. United States v. Idaho, 2023 WL 3284977, at *1. (D Idaho 2023).

176. *Id.* (emphasis in original).

177. United States v. Idaho, 623 F. Supp. 3d 1096, 1103 (D. Idaho 2022), *reconsideration denied*, 2023 WL 3284977 at *1, (May 4, 2023), *cert. granted sub nom.* Moyle v. United States, 144 S. Ct. 2015 (2024), *cert. dismissed*, 603 U.S. 325 (2024).

178. IDAHO CODE § 18-622(1) (2022) (emphasis added).

179. Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1148 (Idaho 2023).

180. United States v. Idaho, 623 F. Supp. 3d 1096, 1105 (D. Idaho 2022) *reconsideration denied*, 2023 WL 3284977 at *1, (May 4, 2023), *cert. granted sub nom.*

181. *Id.* at 1101.

182. 42 U.S.C. § 1395dd(e)(3)(A) (2024).

183. United States v. Idaho, 623 F. Supp. 3d 1096, 1101 (D. Idaho 2022).

If the physician provides the abortion, she faces indictment, arrest, pretrial detention, loss of her medical license, a trial on felony charges, and at least two years in prison. Yet if the physician does not perform the abortion, the pregnant patient faces grave risks to her health—such as severe sepsis requiring limb amputation, uncontrollable uterine hemorrhage requiring hysterectomy, kidney failure requiring lifelong dialysis, hypoxic brain injury, or even death. And this woman, if she lives, potentially may have to live the remainder of her life with significant disabilities and chronic medical conditions as a result of her pregnancy complication. All because Idaho law prohibited the physician from performing the abortion.[184]

As explained by an obstetrician-gynecologist practicing in Idaho, "while the State's physician declarations speak in terms of absolutes . . . medicine does not work that way in most cases. Death may be a possible or even probable outcome, but different outcomes or conditions may also be probable."[185] According to the physician who testified, if the Idaho law goes into effect, "a physician administering an emergency abortion in Idaho would be risking their professional license, livelihood, personal security, and freedom."[186]

Understanding the obvious impossibility of complying with both state and federal law, the district court granted the United States's motion for preliminary injunction to enjoin Idaho from enforcing its law, relying on "Article VI, Paragraph 2 of the Constitution—the Supremacy Clause."[187] As explained by the court, "the Supremacy Clause says state law must yield to federal law when it's impossible to comply with both. And that's all this case is about."[188] Avoiding any consideration of Idaho's abortion ban, or what the court refers to as "the bygone constitutional right to an abortion," the court resolved the "far more modest issue—whether Idaho's criminal abortion statute conflicts with a small but important corner of federal legislation," finding that "[i]t does."[189]

Based on its conclusion, the court blocked enforcement of the Idaho ban and made clear that the injunction against enforcement "shall remain in full force and effect through the date on which judgment is entered in this case."[190] While that case was pending, however, Idaho appealed the

184. *Id.*

185. *Id.* at 1105 (quoting the testimony of Dr. Emily Corrigan, a board-certified Obstetrician-Gynecologist practicing at a Boise hospital).

186. *Id.*

187. *Id.* at 1102.

188. *Id.*

189. *Id.*

190. *Id.* at 1117.

decision to enjoin enforcement of the law to the Ninth Circuit Court of Appeals, seeking to get the injunction lifted, but the court, sitting *en banc*, declined to lift it.[191] Idaho then sought relief from the United States Supreme Court, which granted certiorari before the State court's judgment, and allowed Idaho to enforce its ban while the Supreme Court considered the case.[192] This decision immediately interfered with care being given to pregnant women, who could no longer receive abortion care and had to be airlifted out of Idaho "roughly every other week, compared to once in all of the prior year (when the injunction was in effect)."[193] Approximately five months after granting certiorari, the Court vacated that decision and dismissed it "as improvidently granted."[194] In doing so, the Court also allowed the Idaho District Court's injunction against enforcing its abortion ban to again take effect while the case proceeds "in the regular course."[195]

Thus, Idaho will have to wait and see whether the federal law will preempt the enforcement of its law and whether the resolution of this case will apply to other states with abortion bans and restrictions. The Court's handling of this case is just another example of the confusion and concern that the *Dobbs* decision and its reach have created.

A case recently decided by the Alabama Supreme Court offers yet another example of how far *Dobbs* may reach and the threat it poses to rights on which both women and men have come to depend.[196] In *LePage v. Center for Reproductive Medicine*, the court allowed a wrongful death action to proceed against a clinic that accidentally destroyed embryos created through in vitro fertilization (IVF) that were being stored for patients hoping to start or add to their families.[197] The court based its decision on its assumption that all embryos are "extrauterine children"[198] who deserve the same protection that applies to all "unborn children."[199] Notably, the court made the sweeping observation that "[a]ll parties to these cases, like all members of this Court, agree that an unborn child is a genetically unique human being whose life begins at fertilization and ends

191. United States v. Idaho, 82 F.4th 1296, 1296 (9th Cir. 2023).

192. Order Granting Stay and Certiorari Before Judgement, Moyle v. United States, 144 S. Ct. 540, 540 (2024).

193. Moyle v. United States, 603 U.S. 325, 326 (2024) (Kagan, Sotomayor, & Jackson, JJ., concurring).

194. *Id.* at 2016.

195. *Id.* at 2017 (Kagan, Sotomayor, & Jackson, JJ., concurring).

196. No. SC-2022-0515, 2024 WL 656591 (Ala. Feb. 16, 2024).

197. *Id.* at *1.

198. *Id.*

199. *Id.* at *2.

at death."[200] Although the Alabama Legislature acted quickly to protect IVF centers from liability in response to this decision,[201] it should not escape notice that the court accepted the idea that embryos being stored in a petri dish should be viewed as children who deserve the same protection that applies to all "unborn children" regardless of their "developmental stage, physical location, or any other ancillary characteristics."[202] If other jurisdictions accept this idea, it may spell the end of IVF, which, ironically, creates life where it could not be created before.[203]

These cases, taken together make clear that *Dobbs* is raising questions in areas that go well beyond abortion, impacting not only IVF services but also contraceptive use.[204] In the years since *Dobbs*, prescriptions for oral contraception to prevent pregnancy, and emergency contraception to prevent a fertilized egg from developing, have declined in states with restrictive abortion policies.[205] This evidence may be explained by the closure of clinics that, before *Dobbs*, provided abortive contraception that were "critical in preventing pregnancy and the need for abortion" in the first place.[206] Other evidence has shown that, immediately after *Dobbs*, more people—both women and men—sought permanent contraception, including tubal ligation and vasectomy, perhaps reflecting their fears of restricted access to abortion and contraception.[207]

At the time of this writing, contraception remains available, but *Dobbs* may well put an end to that if concern over protecting "potential life" is taken to its logical end.[208] The Merriam-Webster Dictionary defines

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200. *Id.*

201. *See* Ala. S.B. No. 159, Reg. Sess. (Ala. 2024) (immunizing IVF service providers from civil and criminal liability).

202. LePage v. Ctr. Reprod. Med., No. SC-2022-0515, 2024 WL 656591 at *4 (Ala. Feb. 16, 2024).

203. *See In Vitro Fertilization Use Across the United States*, U.S. DEP'T OF HEALTH AND HUM. SERVS., (Mar. 18, 2024), https://www.hhs.gov/about/news/2024/03/13/fact-sheet-in-vitro-fertilization-ivf-use-across-united-states.html ("IVF enables individuals who use fertility preservation services to save their eggs, sperm, or reproductive tissues to have children at a later time.").

204. *See* JACQUELINE E. ELLISON ET AL., CHANGES IN PERMANENT CONTRACEPTION PROCEDURES AMONG YOUNG ADULTS FOLLOWING THE *DOBBS* DECISION, JAMA HEALTH FORUM (2024) (studying contraceptive use after *Dobbs* by adults ages 18–30); DIMA M. QATO ET AL., USE OF ORAL AND EMERGENCY CONTRACEPTIVES AFTER THE U.S. SUPREME COURT'S *DOBBS* DECISION, JAMA NETWORK (2024) (studying over 143 million prescriptions dispensed at U.S. pharmacies from March 2021 through October 2023).

205. QATO, ET AL., *supra* note 204 (noting a decline in the number of prescriptions filled for contraception between March 2021 and October 2023).

206. *Id.*

207. ELLISON ET AL., *supra* note 204 (noting an increased demand for permanent contraception including sterilization and vasectomies in adults ages 18–30).

208. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 256 (2022).

"potential" as "something that can develop or become actual."[209] A woman's eggs certainly develop into life, as does a man's sperm. Both eggs and sperm are the necessary building blocks of potential life. Thus, based on *Dobbs*, there is nothing to stop a state from regulating the very process of fertilization. Put another way, states can limit access to contraceptive medication or surgical sterilization that prevents pregnancy in the first place.[210] At its core, *Dobbs* granted states the power to decide how to protect potential life. The Court put no limits on where that power will end or how it will affect the health of women and the welfare of both men and women who may or may not want children.

CONCLUSION

By granting states the power to define the meaning of "potential life," the *Dobbs* Court has changed the landscape for women seeking abortion care. The decision's reach has already gone well beyond abortion. Physicians are refusing to care for pregnant women who may or may not need an abortion for fear of criminal prosecution and civil liability if a fetus is lost. States are reconsidering access to in vitro fertilization treatment and contraception because the Court has not defined the limits of its power to protect potential life. By protecting potential life without defining it, *Dobbs* is broad enough to allow states to restrict or ban access to contraceptive drugs or procedures. Therefore, as states exercise this power, the only way one could control whether to have children may well be just to say no.

209. *Potential*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/potential (last visited May 11, 2025).

210. *See* Weber, *supra* note 15.