

## ***Dobbs* Update: Mississippi's Brief**

### BACKGROUND:

*Dobbs v. Jackson Women's Health Organization* is a case at the U.S. Supreme Court that could lead to a sea change in abortion jurisprudence as well as constitutional interpretation in general. On July 23, 2021, the state of Mississippi filed its brief in support of its position.

### ANALYSIS:

In its brief, Mississippi forthrightly asserts that there is no right to abortion in the Constitution, and the Court should expressly overrule *Roe v. Wade* and *Planned Parenthood v. Casey*. The state makes its position clear in the opening paragraph: "Under the Constitution, may a State prohibit elective abortions before viability? Yes. Why? Because nothing in constitutional text, structure, history, or tradition supports a right to abortion. A prohibition on elective abortions is therefore constitutional if it satisfies the rational basis review that applies to all laws." Because *Roe* and *Casey* prohibit laws that would create an "undue burden" on women seeking elective abortion, the question then is whether the Court should overrule its prior decisions. To Mississippi, the answer is a resounding yes, calling the cases "egregiously wrong" and "hopelessly unworkable."

Mississippi notes that the Court's abortion jurisprudence is unique, not based on neutral principles applied by objective judges. And it also notes that the Court upheld the right to abortion in *Casey* based on a misguided belief that to do otherwise would harm the Court's credibility. "The last 30 years show the opposite. *Roe* and *Casey* are unprincipled decisions that have damaged the democratic process, poisoned our national discourse, plagued the law—and, in doing so, harmed this Court."

Mississippi also notes that some of the premises on which the *Roe* decision was based have been proven wrong in the intervening years. For example, *Roe* and *Casey* both discuss abortion in the context of the point at which a fetus is viable outside the womb, as that is when the state first has an interest in protecting human life. But now "scientific advances show that an unborn child has taken on the human form and features months before viability."

In the alternative, Mississippi argues that, even if the Court chooses not to overrule *Roe* and *Casey*, the law at issue does not impose an "undue burden" on women seeking elective abortion, such that it should be upheld. The lower courts found that the Mississippi law was unconstitutional because, in their view, *Roe* and *Casey* prohibited

any bans on pre-viability abortion. But Mississippi argues that the “undue burden” standard does not contain such a bright line, and that laws like the one in Mississippi, which bans abortions after fifteen weeks, but with several key exceptions, do not impose an undue burden.

Mississippi has strongly argued in favor of interpreting the constitution as written, and in favor of the interest of the state in protecting unborn life. The American Cornerstone Institute applauds the effort and hopes that at least five Supreme Court justices heed their better angels.

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