Attorney General Lynn Fitch Files Brief in Dobbs v. JWHO

OVERVIEW

1) ***Dobbs v. Jackson Women's Health Organization* is an opportunity for the Court to clarify the scope of the people's authority, through the States, to address the hard issue of abortion. *Roe* and *Casey* have enmeshed the Judiciary in a contested policy matter that it can never resolve, and these precedents prevent a workable approach, which is to return the matter to legislators.**

2) **Mississippi Attorney General Lynn Fitch is defending the interests of the people and asking the Court to affirm the right of the people to act through their elected officials. The Supreme Court has been clear that the people may act to protect legitimate interests, to include protecting unborn life, women's health, and the integrity of the medical profession.**

3) **At minimum, it is time for the Court to revisit the guidepost of viability to ensure we don't stay mired in outdated science and societal standards. In the nearly 50 years since Roe, science and society have marched forward, and they will not retreat. *Roe* and *Casey* shackle states to a view of facts that is decades out of date.**

BACKGROUND

Enacted in 2018, Mississippi's Gestational Age Act prohibits abortion after 15 weeks' gestation, with exceptions for medical emergency or severe fetal abnormality. *Pg6*

The district court issued a TRO blocking the Act. *Pg9*

The court reasoned that the Act functions as a prohibition on abortions after 15 weeks' gestation, that under *Roe* and *Casey* a State "cannot 'support a prohibition of abortion'" before viability regardless of "any interests" the State may have, and that the Act's lawfulness thus "hinges on a single question: whether the 15-week mark is before or after viability." *Pg9*

The Fifth Circuit affirmed. … As relevant here, the court of appeals explained that under *Casey* "no state interest can justify a pre-viability abortion ban," that 15 weeks' gestation is before viability, and that by prohibiting abortion after 15 weeks' gestation the Act "undisputedly prevents the abortions of some non-viable fetuses." *Pg10*

Judge Ho concurred in the judgment. He stated: "Nothing in the text or original understanding of the Constitution establishes a right to an abortion." … But he believed that "[a] good faith reading" of Supreme Court precedent required affirmance. *Pg10*

SUMMARY OF ARGUMENTS

This Court should hold that a State may prohibit elective abortions where, as here, a rational basis supports doing so. The Constitution does not protect a right to abortion or limit States' authority to restrict it. On a sound view of the Constitution, a state law restricting abortion is valid if it satisfies the rational-basis review that applies to all laws. *Pg10*

The Act reasonably furthers valid interests in protecting unborn life, women's health, and the medical profession's integrity. *Pg11*

Rational-basis review is not applied to abortion laws because this Court's precedents subject such laws to heightened scrutiny. This Court should overrule those precedents. Those precedents are grievously wrong, unworkable, damaging, and outmoded. *Pgs10-11*

At minimum, this Court should reject viability as a barrier to prohibiting elective abortions and reject the judgment below. A viability rule has no constitutional basis, it harms state interests, and it produces other severe negative consequences. *Pg11*

ARGUMENTS

We're asking the Court for clarity because neither the Constitution nor the Court have recognized an absolute right to an abortion.

Because nothing in text, structure, history, or tradition makes abortion a fundamental right or denies States the power to restrict it, that "power[ ]" is "reserved to the States." *Pg13*

Roe* departed from prior cases by invoking a sweeping general "right of privacy" unmoored from constitutional text, structure, history, and tradition. *Pg16

Roe **itself acknowledged that "[t]he pregnant woman cannot be isolated in her privacy."** *Pg17*

Casey **did not embrace** *Roe's* **right-of-privacy reasoning, and instead grounded** *Roe's* **holding on an "explication of individual liberty" that focused on the constitutional protection that this Court's cases have afforded "to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."** *Pg16*

Roe's **departure from the Constitution and past cases—and** *Casey's stare-decisis*-**focused adherence to that departure … fail to account for the material difference between a right to abortion and interests recognized in other cases.** *Pg17*

[A] right to abortion cannot be justified by a right of privacy or a right to make important personal decisions. Nowhere else in the law does a right of privacy or right to make personal decisions provide a right to destroy a human life. *Pg17*

Some have attempted to defend a right to abortion under equal-protection principles. *Pg17*

[L]ast year the five Justices supporting the Court's judgment in *June Medical* **could not agree on what** *Casey* **means, and the five Justices who agreed on what Casey means could not agree on the judgment.** *Pg22*

Of course, the "fact that the justification" for *Roe* **"continues to evolve" itself "undermin[es] the force of** *stare decisis*.**"** *Pg18*

This Court's abortion cases are pervaded by special rules that apply largely or only in the abortion context. …Too many Members of this Court, in too many cases, over too many decades have called out this special-rules problem to dismiss it. *Pgs24-25*

[A]bortion jurisprudence is at war with the constitutional demand that this Court act based on neutral principles of law. *Pg24*

Under *Roe* **and C***asey* **the Judiciary mows down state law after state law, year after year, on a critical policy issue. That is dangerously corrosive to our constitutional system.** *Pg27*

Defending the Interests of the People

While crediting States with important interests, *Roe* and *Casey* impede States from advancing them. Before viability the undue-burden standard has been understood to block a State from prohibiting abortion to assert those interests. And that standard forces a State to make an uphill climb even to adopt regulations advancing its interests. *Pg3*

***Casey* recognized that *Roe's* disregard for state interests had to be abandoned—which is to say, *Casey* recognized that *Roe* failed to workably account for state interests. … *Casey* tried to improve upon *Roe* by replacing strict scrutiny with the undue-burden standard. But that standard too defeats important state interests rather than accounts for them.** *Pg22*

The workable approach to accommodating the competing interests here is to return the matter to "legislators, not judges." *Pg21*

Under our Constitution, such issues "are to be resolved by the will of the people." … That is all the more important when medical and other advances matter so much. Legislatures should be able to respond to those advances, which they cannot do in the face of flawed precedents that are anchored to decades-stale views of life and health. *Pg21*

As long as those cases stand, the people and their elected representatives can never achieve, through person-to-person engagement and deliberation, any real compromise on the hard issue of abortion. *Pg23*

This Court's precedents wall off too many options and force people to look to the Judiciary to solve the abortion issue—which, 50 years shows, it cannot do. *Pg23*

The national fever on abortion can break only when this Court returns abortion policy to the States—where agreement is more common, compromise is often possible, and disagreement can be resolved at the ballot box. *Pg24*

The Act itself identifies three valid state objectives and it rationally relates to each one. *Pg36*

First, the State asserted its "interest in protecting the life of the unborn." … This Court has endorsed that interest. *Pg36*

Second, the State asserted its interest "in protecting the health of women." … In abortions performed after 15 weeks' gestation, the Legislature added, "there is a higher risk of requiring a hysterectomy, other reparative surgery, or blood

transfusion." … By limiting abortion after 15 weeks' gestation, the Legislature could have reasonably believed that it was averting these harms to some women. *Pg37*

Third, the State asserted its interest in protecting the medical profession's integrity. …The Legislature could reasonably believe that prohibiting abortions after 15 weeks' gestation would protect the profession by reducing potential exposure to a demeaning, harmful practice. *Pg37*

Any of these interests justifies the Act. *Pg37*

It's time for the Court to revisit the guidepost of viability to ensure we don't stay mired in outdated science and societal standards.

Roe **and** *Casey* **shackle States to a view of the facts that is decades out of date.** *Pg4*

Medical Advancements

Casey **recognized that "time has overtaken some of** *Roe's* **factual assumptions," including about abortion risks and the timing of viability. …** *Casey* **thought that those changes "have no bearing on the validity of** *Roe's* **central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." … Whatever the truth of that statement in 1992, events have left it behind.** *Pg30*

Advances in "neonatal and medical science" … now show that an unborn child has "taken on 'the human form' in all relevant respects" by 12 weeks' gestation. … Knowledge of when the unborn are sensitive "to pain" has progressed considerably. … Yet *Casey* **and** *Roe* **still impede a State from acting on this information by prohibiting pre-viability abortions.** *Pgs30-31*

A viability rule erects an arbitrary line that produces arbitrary results. *Pg44*

Policy and Culture Shifts

Roe **suggested that, without abortion, unwanted children could "force upon" women "a distressful life and future." … But numerous laws enacted since** *Roe*—**addressing pregnancy discrimination, requiring leave time, assisting with childcare, and more—facilitate the ability of women to pursue both career success and a rich family life. … And today all 50 States and the District of Columbia have enacted "safe haven" laws, giving women bearing unwanted children the option of "leaving [the] newborn directly in the care of the state until it can be adopted."** *Pg29*

Policy can effect dramatic expansions in access to contraceptives. *Pg29*

Contraceptive developments undercut any claim that *Roe* **is needed to enable "women to participate equally in the economic and social life of the Nation" by "facilitat[ing] … their ability to control their reproductive lives."** *Pg30*

Casey's **assessment would, moreover, be greeted coolly by many women and mothers who have reached the highest echelons of economic and social life independent of the right bestowed on them by seven men in** *Roe***.** *Pg35*

Many laws (largely post-dating *Roe***) protect equal opportunity—including prohibitions on sex and pregnancy discrimination in employment, … guarantees of employment leave for pregnancy and birth, … and support to offset the costs of childcare for working mothers.** *Pg35*

Casey **gives no good reason to believe that decades of advances for women rest on** *Roe***, and evidence is to the contrary.** *Pg35*