



ALAN WILSON
ATTORNEY GENERAL

July 6, 2022

The Honorable John R. McCravy, III
Chairman, Ad Hoc Committee to Study *Dobbs v. Jackson Women's Health Org.*
420 B Blatt Building
HAND DELIVERY

Dear Representative McCravy:

I have been requested to provide your Committee with a summary of current litigation over South Carolina's Fetal Heartbeat and Protection From Abortion Act, Act No. 1, 2021 S.C. Acts (S.C. Code Ann. §44-41-610, *et seq.*) and its status in light of the *Dobbs* decision. Because litigation remains pending regarding this law and future litigation is anticipated, I am limiting this letter to this summary.

As you know, this law bars an abortion when a heartbeat is detected subject to specified exceptions such as prevention of the death of the pregnant woman. The law also contains other provisions such as for ultrasounds and reporting.

This law was challenged in February, 2021 by a Complaint brought by Planned Parenthood, the Greenville Women's Clinic, and Terry Buffkin, MD against the Attorney General, the Director of the Department of Health and Environmental Control, members of the South Carolina Board of Medical Examiners, and three Solicitors.

The Court initially granted a Temporary Restraining Order as to the Act over the opposition of the Attorney General and some of the other defendants. The Court allowed the Governor and Speaker of the House to intervene as Defendants pursuant to their motions. Following a hearing and the filing of Memoranda in Opposition, this Court granted Plaintiffs' Motion for a Preliminary Injunction of the entire Act including provisions other than the restrictions therein on abortions.

The Attorney General, the Governor, the Speaker and Solicitor William Walter Wilkins, III, appealed the Court's Order as to provisions of the law other than those which bar an abortion such as those noted above. The Appeal reserved the right to challenge the District Court's view that any previability limit on abortion is unconstitutional citing the Supreme Court's grant of certiorari in *Dobbs*. Following, briefing, the Court of Appeals affirmed the District Court's decision this February. The

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Appellants petitioned for rehearing, and that Petition remains pending. Meanwhile, the District Court proceedings had been stayed since July 13, 2021, pending a decision by the Supreme Court in *Dobbs*.

On June 24, as you know, the Supreme Court issued its Opinion in *Dobbs*. The lengthy Opinion included the following conclusion:

We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.

Dobbs v. Jackson Women's Health Org., No. 19-1392, 2022 WL 2276808, at *43 (U.S. June 24, 2022). The Opinion also included the following standard in its review of the Mississippi law at issue which, subject to the specified exceptions in the legislation, prohibited abortions at a gestational age greater than 15 weeks.

We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate standard.

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Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history.

Dobbs, supra, 2022 WL 2276808, at *42. The Court upheld the Mississippi law under this standard.

The same day that *Dobbs* was decided and based upon that Opinion, the Attorney General, the Governor, the Speaker and Solicitor Wilkins, moved for the Court of Appeals to vacate the District Court's Order granting the Preliminary Injunction, withdraw the Opinion of the Panel of the Court affirming the Injunction Order and remand the case to the District Court. That Motion remains pending.

These parties also moved in the District Court for Summary Judgment based upon *Dobbs* and requested the Court to stay the Preliminary Injunction. The Court stayed the Injunction but has not ruled on the Summary Judgment Motion. The Heartbeat Act is not enjoined while this stay remains in effect.

Plaintiffs have moved to dismiss their case without prejudice. The Attorney General, the Governor, the Speaker and Solicitor Wilkins have opposed dismissal "without prejudice" because Plaintiffs are seeking to avoid being barred from future litigation by a dismissal "with prejudice" under the legal doctrine of "res judicata." These

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Defendants said that the Court should deny the Motion to Dismiss “without prejudice” and should grant summary judgment for the Defendants or alternatively “dismiss with prejudice.”

I hope that the information in this letter will be helpful to the Committee. Because of the pendency of the above case and the motions that have not been decided and because future litigation is anticipated, commenting on this current and future litigation other than providing this summary would not be appropriate. We will be posting this letter on the Attorney General’s Office website so the public may have access to this information.

Respectfully,

A handwritten signature in blue ink, appearing to read "J. Emory Smith, Jr.", with a stylized, flowing script.

J. Emory Smith, Jr.
Deputy Solicitor General