

THE OHIO ABORTION LANDSCAPE AFTER DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

OVERVIEW

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This document answers some important questions about how the Supreme Court of the United States' (SCOTUS) decision in *Dobbs v. Jackson Women's Health Organization* will impact Ohioans. The ultimate SCOTUS decision closely resembles the leaked draft of the Supreme Court's opinion and overrules *Roe v. Wade* and *Planned Parenthood v. Casey*. This means that there is no longer a federal constitutional right to abortion and individual states have the authority to regulate or ban abortion altogether.

WHAT HAPPENS NOW IN OHIO?

Ohio is now enforcing a "heartbeat ban." These bans are also called six-week bans because they conflate embryonic cardiac cell activity with a fetal heartbeat. Since this cellular activity can be detected by some types of ultrasounds at approximately six-weeks' gestation and sometimes even earlier, "heartbeat" bans are essentially six-week gestational bans. This means abortion is legal in Ohio only until around six weeks gestation. (Six weeks of gestation is more like four weeks of actual embryonic development, however, since pregnancy is measured from the last day of a person's menstrual period (LMP) – or roughly two weeks before a person is actually pregnant.)

Ohio originally passed its six-week ban into law in 2019 (Senate Bill 23). It was quickly blocked from going into effect because it violated the constitutional rights established through the U.S. Supreme Court's decisions in *Roe* and *Casey*. The June 24, 2022, SCOTUS decision in *Dobbs* now allows states to prohibit abortion, allowing the law to take effect. Thus, an Ohio judge lifted the injunction blocking the six-week ban law within hours of the *Dobbs* decision. This means that a six-week ban is now enforced in Ohio (O.R.C. §§ 2919.19, 2919.191-2919.196).

HOW DOES OHIO DEFINE "FETAL HEARTBEAT"?

Ohio law defines a "fetal heartbeat" as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac" (ORC § 2919.19). This definition is not clinically accurate. Although ultrasound can detect embryonic cardiac activity at approximately six weeks of gestation or even earlier,^{1,2} the activity captured by such technology is just the cells that will eventually form the heart starting to fire. At six weeks of pregnancy, an embryo initially measures between one and two millimeters in length³ and has neither a fully developed heart nor cardiovascular system; therefore, it cannot have a heartbeat.⁴ According to the American College of Obstetricians and Gynecologists⁵, "until the chambers of the heart have been developed and can be detected via ultrasound (roughly 17 - 20 weeks of gestation), it is not accurate to characterize the embryo's or fetus's cardiac development as a heartbeat."

HOW DOES THE SIX-WEEK BAN IMPACT OHIOANS?

Since most people do not know they are pregnant at six weeks of gestation, the six-week ban prohibits almost all abortions in the state of Ohio. Forthcoming OPEN research⁶ indicates the potential implications of Ohio's six-week ban. Based on surveys with adults seeking medication or procedural abortions at seven clinics in Ohio between April 2020 and April 2021, 25% discovered their pregnancy after six weeks gestation and 89% of abortions occurred after six weeks gestation. Over half of study participants would now no longer be able to have an abortion, since the median gestation at termination was 57 days, or two weeks after Ohio's new six-week threshold. National data from the past two decades shows that most people only become aware of their pregnancy around 5.5 weeks gestation⁷. Aggregate national data also supports the finding that those who seek abortion usually access it after the sixth week of gestation.⁸

WHAT IS THE LIKELY LONG-TERM IMPACT OF DOBBS ON ABORTION ACCESS IN OHIO?

The Ohio state legislature is poised to totally ban abortion through the passage of a ban with criminal penalties (Senate Bill 123 or House Bill 598, which are functionally identical) or a ban modeled on the Texas “private bounty” law (House Bill 480). SB 123, HB 598, and HB 480 all ban abortion after fertilization. These bills define an “unborn child” as “an individual organism of the species *homo sapiens* from fertilization until live birth.” HB 480 additionally includes a personhood clause that would change all Ohio laws to consider the product of conception a “person,” except where the term is otherwise defined.

None of these bills include exceptions for rape or incest. Instead, both laws contain narrow “affirmative defenses” which place the burden on the physician to prove the abortion was necessary. Under HB 480, abortion would only be allowed to prevent the death of the pregnant person in the case of a physical medical emergency, and under SB 123/HB 598, abortion is allowed only to prevent the death or serious risks to the physical health of the pregnant person. If Ohio passes a trigger ban, exceptions for medical emergencies will include additional barriers to care - abortions would be required to take place at a hospital, be approved by multiple physicians before being permitted, and not consider mental health crises to be medical emergencies.

Importantly, people who help with, perform, or aid and abet abortions may face criminal charges and civil penalties, depending on which piece of legislation passes. HB 480 is like Texas’ SB 8 and would create a bounty system for reporting abortion providers through private civil actions. The other bills would create the crimes of “criminal abortion, abortion manslaughter,” and “promoting abortion.”

Pregnant people who attempt or complete an abortion would have immunity from prosecution under all proposed abortion bans, although HB 480’s personhood provision could result in criminalization of pregnant people for conduct during pregnancy.

ARE THERE ALTERNATE LEGAL AVENUES TO RESTORE ABORTION ACCESS BEYOND SIX WEEKS IN OHIO?

Yes. The ACLU, ACLU of Ohio, and Planned Parenthood have filed suit in the Ohio Supreme Court under the Ohio Constitution to get the six-week ban blocked.

ARE THERE OTHER ABORTION RESTRICTIONS AFFECTED BY THE DECISION?

Yes. In 2019, Ohio passed a ban on the most common second trimester, or procedural, abortion method, called dilation and extraction (D&E). Clinics use this method for abortions after roughly 15 weeks of gestation. A court initially blocked most of the D&E ban from going into effect. However, after the SCOTUS *Dobbs* decision negated *Roe*’s protections, an Ohio judge also let this ban take effect on June 24, 2022. Notably, the enactment of the six-week ban makes enactment of the D&E ban moot so long as the six-week ban is upheld.

Several other abortion restrictions are currently in litigation. For instance, there are federal-court challenges to several laws that affect abortion clinic licensing. These rules, also called targeted regulation of abortion providers (TRAP) laws, make it difficult and burdensome for abortion clinics to remain in operation. In addition, challenges are pending in state court to laws that 1) require cremation or burial of tissue from procedural abortions, 2) ban telemedicine for abortions performed with medication, and 3) make it difficult for clinics to operate. The SCOTUS decision will not immediately affect these laws.

WILL EMERGENCY CONTRACEPTION (EC) AND IUDS BE AFFECTED IF OHIO BANS ABORTION? WHAT ABOUT IN VITRO FERTILIZATION (IVF)?

These forms of health care would not be immediately affected because they do not qualify as “abortion” under current Ohio law. Ohio defines abortion as “the purposeful termination of a human pregnancy by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead fetus or embryo.”

Since EC, IUDs, and IVF do not involve the purposeful termination of an existing pregnancy, they do not fall under this definition. However, the Ohio legislature is currently considering bills that would go further and explicitly state that “personhood” status begins at fertilization (i.e., HB 480), which risks classifying EC and IUDs as abortifacients and has implications for unused fertilized eggs from IVF treatments.

WHAT IS SENATE JOINT RESOLUTION 7, OR THE OHIO CONSTITUTIONAL AMENDMENT TO GUARANTEE REPRODUCTIVE FREEDOM? IS IT LIKELY TO PASS?

Senate Joint Resolution 7 (S.J.R. 7) is a proposition to amend the Ohio Constitution to guarantee reproductive freedoms, which include “the right to make and effectuate decisions about all pregnancy matters, including prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.” The resolution would need approval from 3/5 of both the Ohio House of Representatives and Senate to pass, which is unlikely given how current legislators have voted on abortion bans. Such a vote would not occur before the end of this year. If the resolution does pass, Ohioans would get to vote for or against the amendment on a general election ballot.

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