

# NORWALK REFLECTOR

## Abortion case tests Supreme Court's rightward shift after Trump

Todd Ruger and Sandhya Raman

November 30<sup>th</sup>, 2021

The Supreme Court hears arguments Wednesday in a case that asks the justices to overturn the long-standing decisions that established the right to abortion in the United States, a moment that Republican politicians, conservative legal groups and anti-abortion activists have worked for decades to deliver.

The 1973 landmark decision in *Roe v. Wade* that first legalized abortion also helped spark that movement, which has become a steady theme in partisan politics and the Senate's most recent history of contentious Supreme Court confirmation hearings.

Then-Majority Leader Mitch McConnell and Republicans rushed ahead of the 2020 presidential election to confirm Amy Coney Barrett, the last of then-President Donald Trump's three appointments to the high court, to give conservatives what appears to be a solid anti-abortion majority on that bench.

Now, what those justices say Wednesday in a challenge to a Mississippi abortion law could reveal how far and how fast the new 6-3 conservative majority will change the legal landscape for abortion — and possibly even eliminate the right for nearly half the women in the United States of reproductive age, mostly in swaths across the South and Midwest.

“For the first time in eight decades or so, we have six conservative justices on the court,” Josh Blackman, a constitutional law professor at the South Texas College of Law Houston, said. “And this case is a gut check to see where those justices are.”

Ilya Shapiro, vice president of the Cato Institute, a libertarian think tank, called the Mississippi case “sort of the put up or shut up moment” for the conservative legal effort, which developed legal theories such as originalism and textualism, gave rise to conservative justices such as Clarence Thomas and the late Antonin Scalia, and grew the right-leaning Federalist Society.

That push included installing “a pipeline of lawyers and eventually judges to take back the courts from the liberal activism” of the 1960s and 1970s, Shapiro said, and the Mississippi case, with Trump’s appointees, “will show whether there’s a payoff for this decadeslong effort.”

### **Mississippi and viability**

At issue in the case is a Mississippi law that bans abortions after 15 weeks of pregnancy, which is before the fetus could survive outside the womb on its own, known as viability, which generally is considered to be around 24 weeks. There is little disagreement that the law violates Roe, in which the Supreme Court ruled that states could not enact laws to ban abortions before viability of the fetus.

The Supreme Court under Chief Justice John G. Roberts Jr. often has tended to look for a compromise position that avoids sharply divided 5-4 decisions, an approach that moves the law in a conservative direction incrementally rather than in large steps. But many legal experts see little middle ground in this case when it comes to viability, and his vote is not as central with five other conservatives on the court.

The main question is whether those justices who disagree with Roe and other abortion decisions will look to wipe away all or part of those precedents, or keep those precedents in place because the country has relied on them for so long, legal experts say.

Mississippi officials argue in the case that the Supreme Court was “egregiously wrong” in Roe and Planned Parenthood v. Casey, another landmark abortion case in 1992, and those decisions have “inflicted significant damage” and “placed this Court at the center of a controversy that it can never resolve.”

“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,” Mississippi wrote in a brief.

Julie Rickelman, the senior director of litigation at the Center for Reproductive Rights and who will argue Wednesday on behalf of Mississippi’s only abortion clinic, said that a ruling upholding the 15-week ban would be tantamount to overruling Roe and Casey, which the Supreme Court has declined to do under previous lineups of justices.

“Nothing has changed in terms of the facts. Nothing has changed in terms of the law,” Rickelman said during a media briefing. “So there is just no basis for the court to reach a different outcome today than it has in the past on this right.”

### **Big expectations**

The expectations on the conservative justices will be enormous. The Susan B. Anthony List spent \$2.5 million on a television and internet advertising push around the case — in two of them, doctors describe fetal development at stages of pregnancy — as part of a larger \$10 million campaign about the case.

“This moment is the culmination of decades of educational and political work by the pro-life movement, and we are preparing for victory,” the group’s president, Marjorie Dannenfelser, told the media ahead of the ad push.

Trump said during his 2016 campaign that he would appoint Supreme Court justices that would overturn Roe, as Congress remains in a partisan deadlock on any federal abortion legislation. Former Vice President Mike Pence, who is ardently anti-abortion, will speak Tuesday at the National Press Club about the case.

The conservative advocacy group Judicial Crisis Network spent millions on the high-profile confirmation fights for Trump’s appointments of Justices Neil M. Gorsuch, Brett M. Kavanaugh and Barrett, and the group’s chief counsel last month pointed to an uptick in op-eds, protests and messaging about abortion and the court.

“They’re going to be under the most intense pressure campaign that maybe the Supreme Court has ever experienced,” Judicial Crisis Network President Carrie Severino said at an Oct. 27 event hosted by the Heritage Foundation and March for Life.

Mississippi’s attorney general, Lynn Fitch, wrote an op-ed in the Washington Post on Monday that said the justices should return the work of abortion laws to elected state officials, and that she is “certain that when the court overturns Roe, an honest debate over true policy will ensue.”

### **Barrett in the spotlight**

Barrett, the newest justice, is also the most untested on her approach to abortion while on the Supreme Court. As with other Supreme Court nominees, Barrett repeatedly told senators during her confirmation that she would not comment on her view on abortion rights or the Roe and Casey precedents.

But some Republicans were open that they backed Barrett for her stance on abortion. Missouri Republican Sen. Josh Hawley, a former Supreme Court clerk, said on the Senate floor ahead of the confirmation vote that Barrett is “the mostly openly pro-life judicial nominee to the Supreme Court in my lifetime,” and someone “who has been open in her criticism of that illegitimate decision, Roe vs. Wade.”

Hawley, along with Republican Sens. Ted Cruz of Texas and Mike Lee of Utah, filed a brief in the case that urged the Supreme Court to overturn Roe and Casey. A combined 231 Republican members of Congress also urged that outcome in briefs, while 236 Democratic members of Congress, as well as the Biden administration, argued for the opposite.

Mary Ziegler, a law professor at Florida State University who published a book in 2020 on the legal history of abortion in America, said she would be listening Wednesday for clues from key justices — particularly Kavanaugh and Barrett — about how far the court might go.

Ziegler said it was less likely that the Supreme Court would eliminate the right to abortion in this case, but more likely it would remove viability as the line.

“That would still be a big deal, because then every state would be trying different pre-viability bans to see what the court will sign off on,” Ziegler said. “And the Supreme Court will be positioning itself for a decision to overrule Roe, whether that’s like, 2023 or 2024.”

### **Effect on women**

Right now, 16 states ban abortion after 20 weeks of pregnancy, but more restrictive bans have faced legal challenges. After passing laws in 2019, for instance, Utah and Arkansas have not implemented their 18-week abortion bans.

In Mississippi, Jackson Women’s Health Organization currently provides abortion up to 16 weeks of pregnancy, one week longer than the law would allow. But advocates say the litigation has larger implications for Mississippi and other states.

Data from the Guttmacher Institute, a left-leaning reproductive health research organization, suggests that, without Roe as a precedent, 26 states are expected to ban abortion.

Twelve states — including Mississippi — have what advocates call “trigger bans” on the books, which refers to unenforceable abortion bans that would take effect in the absence of Roe.

Guttmacher estimates that if the court upholds all 15-week abortion bans, a Mississippi woman would have to travel to Illinois or North Carolina for the closest abortion provider.

Data from Planned Parenthood Federation of America and In Our Own Voice: National Black Women’s Reproductive Justice Agenda suggests that reversing Roe could block access for 36 million women of reproductive age.

Rickelman, the litigator at the Center for Reproductive Rights, said that Roe has been critical for women’s rights and taking away the right to abortion would propel women backwards.

“It’s the legalization of abortion that has been critical to women being able to pursue educational opportunities more robustly, to be able to pursue their careers more robustly, has allowed women to have higher earnings, and that has really been critical to their ability to protect their economic security and the economic security of their families,” Rickelman said.