Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
June 29, 2022 Edition

SCOTUS OVERRULES *ROE V. WADE*

In *Dobbs v. Jackson Women's Health Organization*, 597 U.S. __ (2022), Jackson Women's Health Organization, an abortion clinic and one of its doctors challenged Mississippi's Gestational Age Act, which prohibits an abortion after 15 weeks of pregnancy except in the case of a medical emergency or a fetal abnormality, on the grounds that it violated the Court's precedent – *Roe v. Wade*, 420 U.S. 113 (1973) and *Planned Parenthood of Southeaster Pa. v. Casey*, 505 U.S. 833 (1992) – forbidding states from banning abortion pre-viability. The district court granted summary judgment in favor of Respondents and permanently enjoined enforcement of the Act, finding that the Act violated *Roe's* and *Casey's* holdings. The Fifth Circuit affirmed. Petitioners argued before the Supreme Court that *Roe* and *Casey* were incorrectly decided and that the Act is constitutional because it satisfies rational-basis review. On June 24, 2022, Justice Samuel A. Alito, Jr. wrote the majority opinion joined by Justices Neil M. Gorsuch, Brett M. Kavanaugh and Amy Coney Barrett, and Justices Clarence Thomas and Brett M. Kavanaugh filing concurring opinions, holding that the Constitution does not confer the right to an abortion. Chief Justice John Roberts filed an opinion concurring with the majority judgment. Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan filed a dissenting opinion.

In overturning *Roe* and *Casey*, the Supreme Court reasoned that the authority to regulate abortion should be controlled by the States. The opinion outlined three sharply conflicting popular views on the issue: those that "believe fervently that a human person comes into being at conception and that abortion ends an innocent life[,]" those that feel "just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality[,]" and "others in a third group [who] think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed." *Dobbs,* 597 U.S. __ (2022). The Court noted that for 185 years, beginning after the adoption of the Constitution, until the decision in *Roe*, each State was allowed to address the issue of abortion according to the views of its citizens. At the time *Roe* was decided, "30 states still prohibited abortion at all stages." The Court observed that in the years prior to the landmark decision "about a third of the States had liberalized their laws." Then, in 1973 the Supreme Court decided *Roe* and abruptly ended the political process then underway.

The majority opinion stresses that the issue before it was whether the Constitution confers a right to obtain an abortion. The Court found the Fourteenth Amendment does not protect the right to an abortion. The Supreme Court pointed out that abortion had long been considered a crime and there was no support in American law for a constitutional right to obtain an abortion until the "latter part of the 20th Century." Next, the Court held that five factors weighed strongly in favor of overruling *Roe* and *Casey*: "the nature of

their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance." Justice Alito argued that *Roe's* legal foundation was always weak. In addition, the Court noted that *Casey* overruled *Roe* in part when it dispensed with *Roe's* trimester scheme and adopted a new "undue burden" test whereby states were "forbidden to adopt any regulation that imposed an 'undue burden' on a woman's right to have an abortion." Justice Alito argued that the line between "undue" and "due" was never clear as the Court left no guidance on this point.

While Justice Alito cautioned in the majority opinion that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion," Justice Thomas' concurrence argued for a complete jettisoning of the doctrine of substantive due process, which forbids the government from infringing certain "fundamental" liberty interests. Justice Thomas advocated that the Court consider in future cases overruling other decisions that legalized the use of contraceptives, consensual sex, and same-sex marriages. Justice Thomas's concurring opinion no doubt will serve as a clarion call for litigants to challenge those decisions, thus guaranteeing that controversy engendered by last week's precedent-shattering decision will continue into the immediate future.

In a strongly worded dissent, Justices Breyer, Sotomayor, and Kagan stated that "[f]or half a century" *Roe* and *Casey* "have protected the liberty and equality of women" and the two cases struck a balance that the Court, through its majority opinion, "discards." The dissent protested that the Court "says that from the very moment of fertilization, a woman has no rights to speak of" and underscored that "women lacking financial resources will suffer from [the majority's] decision." The dissent also warned ominously that "no one should be confident that this majority is done with its work."

Thirteen states have passed what are called "trigger laws" that ban abortions in the event *Roe* is overturned. For example, Kentucky passed a bill in 2019 that would not only ban abortions but also make them a felony; exceptions to the law include injury or death of a pregnant woman. Missouri and North Dakota have laws that would make it a felony to perform an abortion except in the case of a medical emergency. Protests, religious celebrations, litigation and legislation are already underway. Thus, despite the demise of *Roe* and *Casey*, the controversy over abortion rights will continue unabated in the courts as well as the states.

SUPREME COURT SHOOTS DOWN NEW YORK GUN REGULATION

On June 3, 2022, the United States Supreme Court, by a partisan 6-3 split, reversed an opinion by the United States Circuit Court of Appeals for the Second Circuit and continued to expand Second Amendment rights when it ruled that New York State's limitations on concealed carry of guns was unconstitutional. *New York State Rifle & Pistol Association v. Bruen,* 20-843, 597 U.S. ___ (2022), ruled that a New York state law dating from 1911 violated the Second Amendment's provision guaranteeing the right to bear arms. That law conditioned the right to obtain a concealed carry permit to being of "good moral character" and to having "proper cause." The Court ruled that requiring applicants to demonstrate a "special need" to carry a weapon violated the applicants' constitutional rights.

As a general matter, New York bans open carry of handguns. This case stemmed from a lawsuit filed by Robert Nash, Brandon Koch, and the New York State Rifle and Pistol Association, an affiliate of the National Rifle Association. Nash and Koch are two New Yorkers who were denied concealed carry permits due to a lack of proper cause, specifically because they could not show that there was a specific threat to their lives. They had passed background checks and were granted licenses for hunting and target practice, but they were denied a more general license because they failed to show a particular need for self-defense, despite Nash claiming a string of robberies in his neighborhood.

Justice Clarence Thomas, writing for the majority, unveiled his expansive reading of the Second Amendment. "[T]he Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home….The constitutional right to bear arms in public for self-defense is not 'a second-class right" requiring justification. Rather, "that is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant's right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense." The Court did not explicitly reject all gun restrictions, rather vaguely permitting regulation in sensitive areas of the public. What constitutes a "sensitive area" is likely to be litigated over the next several years as gun regulations in at least eight other states and the District of Columbia have been called into question by this decision.

In his dissent, joined by Justices Sotomayor and Kagan, Justice Stephen Breyer expressed disbelief, particularly in light of the recent series of mass shootings and statistics supporting New York's law. He warned that the majority "severely burdens States' efforts" to curb gun violence. "The primary difference between the Court's view and mine is that I believe the Amendment allows States to take account of the serious problems posed by gun violence that I have just described," Breyer wrote. "I fear that the Court's interpretation ignores these significant dangers and leaves States without the ability to address them."

New York Governor Kathy Hochul immediately reacted to the ruling: "It is outrageous that at a moment of national reckoning on gun violence, the Supreme Court has recklessly struck down a New York law that limits those who can carry concealed weapons." Gov. Hochul recently signed a fresh round of gun control laws and has called a special session of the state Legislature to pass new laws in response to this case.

President Biden said in response to the decision, that "this ruling contradicts both common sense and the Constitution and should deeply trouble us all." Meanwhile, at the same time that the Supreme Court was issuing its decision, the United States Senate, acting in response to recent mass shootings in Buffalo, New York and Uvalde, Texas, among many others, was passing the first major gun control legislation in nearly thirty years.

NOW WHAT TO DO?

SCOTUS has upended constitutional precedent so that states may now prohibit abortions but may not restrict guns in public. While the ramifications of such reversals will play out over time, a few immediate concerns should be noted now by employers, unions and benefit funds alike.

NYS Rifle

Most obviously, employees, members and visitors of all sorts may now carry firearms into the workplace, union hall or benefit fund offices – unless prohibited by the host. Similar prohibitions, for example against drugs, are not uncommon and should be considered here. Implementation issues will abound. For example, how should a ban be enforced, how will employees react, and must a ban be negotiated with the employees' union? These issues should be weighed against the potential for loss of life and liability for negligence claims that may ensue. While some may wish to await further state action as Governor Hochul promises, any such state response or mandate will likely face further constitutional challenge. In contrast, the Second Amendment should not apply to private sector bans not involving governmental action.

Post Roe

As Governor Hochul proclaims, New York State proudly remains a safe-harbor for those choosing abortion. Accordingly, residents are not facing the wrenching choices confronting people and companies in other states, but New York may still feel the effects indirectly. For example, major companies such as Citibank and JP Morgan Chase have announced they will offer benefits to employees who need to travel in order to have an abortion, and some states have threatened to prosecute such companies for aiding and abetting a crime. Will such companies transfer eligible employees to offices in New York? If there is a significant influx of patients, what will be the effect on our health care system? Will New York's approach be a draw for New York employers in today's tight labor market? Under guidance issued Monday, Federal employees nationally, including New York, may obtain more liberal leave to travel for "medical care." Beyond abortion, will anti-abortion advocates heed Justice Thomas' call and attack the right to contraceptives as well? The Affordable Care Act requires specified contraception coverage and the Biden Administration is moving to ensure health plan compliance in all 50 states as "more important than ever."

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