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If Roe Falls, Congress Can Protect Abortion Access

The constitutional right to abortion was recognized by the Supreme Court almost 50 years ago in *Roe v. Wade*. The legal right to abortion has [broad support among the majority of Americans](#). Yet access to reproductive healthcare remains uneven and fragmented, with states enacting [106 abortion restrictions in 2021](#), the highest number of restrictions passed in a single year since the *Roe v. Wade* decision.

Prior to *Roe v. Wade*—which affirmed the federal constitutional right to abortion in a 7-2 decision—only [four states](#) had repealed their anti-abortion statutes. *Roe* held that every pregnant person has the right to decide whether to continue their pregnancy prior to viability, known as the point at which a fetus can survive outside of the womb. Thirty years after this decision, in [Planned Parenthood v. Casey](#), the Supreme Court carefully examined arguments to revisit this landmark precedent and upheld the central principle that states cannot prohibit abortion until viability, but acknowledged that states may impose a range of limitations throughout the duration of a pregnancy, as long as the restrictions did not impose an “undue burden” on access to abortion. While the *Casey* decision upheld the constitutionality of *Roe*, it opened the door for states to pass additional restrictions on abortion.

The stakes around abortion have never been higher. While abortion remains legal, a shocking and unprecedented [draft majority opinion](#) from the Supreme Court that leaked on May 2, 2022 indicates the potential for the Court to overturn *Roe*. This decision could also set the stage for spurious attacks on other fundamental rights. With the constitutional right to abortion under threat in over half of states in the country, lawmakers can step up to provide [clear federal protections for abortion](#).

At Stake at the Supreme Court: *Dobbs v. Jackson*

On December 1, 2021, the Supreme Court heard oral arguments in [Dobbs v. Jackson Women's Health Organization](#). The case involves a Mississippi law, HB 1510, the Gestational Age Act, which was enacted in 2018 and bans all abortions after 15 weeks of pregnancy except in medical emergencies and in cases of severe fetal diagnosis. The Mississippi ban has been blocked since 2018 and is not currently in effect. The state's [sole remaining abortion clinic](#), Jackson Women's Health Organization, challenged the law, which was appealed by the state up to the Supreme Court, marking the first time in 50 years that the Supreme Court agreed to hear a case on the constitutionality of a pre-viability abortion ban.

The *Dobbs v. Jackson Women's Health* case is arguably one of the most important abortion cases to be litigated in recent decades due the state of Mississippi directly asking the Supreme Court to overturn *Roe v. Wade* and *Planned Parenthood v. Casey*. There is no path for the Supreme Court to uphold Mississippi's ban without overturning *Roe's* central holding regarding individuals' rights to make fundamental decisions about their lives, their families, and their futures.

On May 2, 2022, *Politico* published the leaked draft majority opinion on the *Dobbs vs. Jackson* case, written by Justice Samuel Alito. The draft opinion states:

“We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment.”

Broader Implications of Abortion Restrictions

[If *Roe* is overturned](#), abortion would remain legal in 22 states and the District of Columbia based on existing state laws, while 25 states and three territories would either immediately ban or likely move to enact legislation to ban abortion. The remaining three states (NH, NM, VA) and territories (PR and USVI) have yet to codify the right to abortion, leaving access to abortion care in these states tenuous should *Roe* fall. The effect of such a ban could be felt immediately in at least 13 states that have enacted [“trigger laws”](#) that would automatically outlaw abortion if *Roe* is overturned or weakened.

The people hurt most by abortion restrictions are those who already face barriers to accessing health care—including women, Black, Indigenous, and People of Color, those working to make ends meet, LGBTQ+ people, immigrants, young people, those living in rural communities, and people with disabilities. As abortion restrictions continue to expand in scope and become more repressive, the effect on marginalized communities may be felt most heavily because restricted abortion access can [exacerbate existing social inequalities](#) and disparities in maternal health equity. States with more abortion restrictions also have higher rates of maternal and infant mortality, which are particularly pronounced in Black women. In 2019, the national Black maternal mortality rate was 44 deaths per 100,000 live births compared to a rate of 17.9 white deaths. Additionally, limiting abortion through various restrictions—such as waiting periods, mandatory ultrasounds, and parental consent—has been shown to *increase* rates of unsafe abortion. Barriers to abortion access also delay critical prenatal care, further contributing to [poor maternal health outcomes](#).

The current web of restrictions creates significant and sometimes insurmountable barriers for people seeking abortion care. People seeking care must often [travel long distances](#), take unpaid time off from work, and find and pay for child care due to state-mandated waiting periods, medically unnecessary repeat visits where doctors must provide patients false information, and a lack of providers due to clinics being forced to close.

Moreover, if the Supreme Court's final decision in *Dobbs v. Jackson Women's Health* relies on the same reasoning in the draft leaked opinion and reaches the same conclusion, it may be the precursor to future legal challenges to other fundamental rights and liberties Americans currently have.

Congressional Actions to Protect Abortion Rights

The [Women's Health Protection Act \(WHPA\)](#) addresses restrictions on reproductive healthcare by enshrining into law the ability for individuals in all 50 states to seek and provide abortion care free from medically unnecessary restrictions—including mandatory waiting periods, biased counseling, and required ultrasounds. As a federal law, the measure would supersede current state regulations that have severely restricted access to abortion, and preserve the right to abortion regardless of whether the Supreme Court moves to overturn *Roe* and *Casey*.

On September 24, 2021, WHPA passed the House of Representatives by a vote of [218-211](#). However, senators voted [46-48](#) against a motion to end debate on the measure, preventing the Senate from advancing to a final vote on the bill itself. On May 3, Senate Majority Leader Chuck Schumer announced plans to [hold a vote](#) codifying abortion rights into federal law.¹ The measure on which the Senate will vote, the [Women's Health Protection Act of 2022 \(S. 4132\)](#), largely mirrors the House bill and would require 60 votes to advance, assuming the body does not make an exception to the filibuster.

In the immediate aftermath of the leaked draft, [President Biden released a statement](#) saying that Congress should pass legislation protecting the legal right to abortion and he would sign it into law. Speaker Pelosi also [released a statement](#) declaring that the fight against the threat posed to reproductive freedom will continue until reproductive rights are enshrined into law.

During this moment of uncertainty surrounding access to comprehensive reproductive care, lawmakers can harness the power of their voices and votes to protect the legal right to abortion for all.

¹ Separately, states have enacted laws to [protect abortion rights](#). Proposals for additional state protections can be found [here](#).

