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Courts in Iowa and Mississippi Show Signs They Will Follow the U.S. Supreme Court

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In an unparalleled victory for unborn children, their mothers, and the rule of law, on June 24, 2022, the United States Supreme Court returned to elected legislatures the authority to protect unborn children and their mothers by limiting or banning abortions throughout pregnancy. In at least 22 states with one or more strong abortion bans that were unenforceable before the decision in *Dobbs v. Jackson Woman's Health Organization*,[i] state officials are now either enforcing a ban or are navigating the legislative or judicial hurdles that are necessary to begin enforcement.

In Iowa and Mississippi, state supreme court decisions have created an additional impediment to the enforcement of the states' abortion bans. While abortion is not mentioned in either state's constitution, in 2018 the Iowa Supreme Court held that "under the Iowa Constitution … implicit in the concept of ordered liberty is the ability to decide whether to continue or terminate a pregnancy."[ii] Likewise, a slim majority of the Mississippi Supreme Court held in *Pro-Choice Mississippi v. Fordice* that the unenumerated rights provision of Mississippi's constitution protects a right of privacy, which includes an implied right to abortion.[iii] However, recent decisions indicate that courts in these states are poised to follow the U.S. Supreme Court's lead in permitting *elected* officials to make abortion policy.[iv]

Iowa

On Friday, June 17, 2022, just a week before the U.S. Supreme Court's monumental decision, the Supreme Court of Iowa reversed its 2018 decision (*PPH II*) in *Planned Parenthood of the Heartland v. Reynolds* (*PPH IV*), holding that "the Iowa Constitution is *not* the source of a fundamental right to an abortion necessitating a strict scrutiny standard of review for regulations affecting that right."[v] The court did not decide what constitutional standard should replace strict scrutiny when evaluating a restriction on abortion, which in this case was a 24-hour reflection period; rather, the court directed the parties to "marshal and present evidence" before the trial court under the *Casey* undue burden test pending the U.S. Supreme Court's decision in *Dobbs v. Jackson*.

For the majority, Judge Mansfield wrote that *PPH II* deviated from approaches taken by other states that have found state constitutional rights to abortion in "substantive constitutional guarantees"[vi] or who have applied *Casey* analysis to state laws. It also departed from the court's own jurisprudence concerning family rights. Further, the decision lacked "textual and historical support."[vii] He correctly stated that "[c]onstitutional interpretation should begin with the constitutional text itself."[viii] Given that Iowa's constitution does not address abortion or pregnancy, any right to abortion "must be encompassed in some more general textual source."[ix] However, "[t]extually, there is no

support for *PPH II*'s reading of the due process clause as providing fundamental protection for abortion."[x] Also, "under the fundamental rights/strict scrutiny approach taken in *PPH II*, there is no effort to balance: having an abortion *without delay* is deemed more important than preserving unborn life."[xi]

Regarding historical support for abortion rights in Iowa, Judge Mansfield explained that "[h]istorically there is no support for abortion as a fundamental constitutional right in Iowa … abortion became a crime in [Iowa] on March 15, 1858—just six months after the effective date of the Iowa Constitution—and remained generally illegal until *Roe v. Wade* was decided over one hundred years later."[xii]

While this case will likely continue at the trial level—Iowa's Supreme Court denied Governor Kim Reynolds's prompt request to rehear *PPH II* in light of *Dobbs*—the Supreme Court of Iowa's unequivocal statement that Iowa's constitution does not protect abortion provides hope and encouragement for the state's unborn children and their mothers.[xiii] Further, Governor Reynolds is petitioning a Polk County District Court to lift the court's injunction against the state's fetal heartbeat (six-week) ban in light of both *PPH IV* and *Dobbs.*[xiv]

Mississippi

In Mississippi, a state court denied an abortion clinic's request for an injunction against the state's trigger ban (which bans abortion throughout pregnancy with limited exceptions) and six-week abortion ban on the grounds that the bans violate the state's constitution.[xv] While considering how the Mississippi Supreme Court will ultimately decide this case, Chancery Judge Debbra Halford first acknowledged that "[t]he plain wording of the Mississippi Constitution does not mention abortion."[xvi] She further noted that the court in *Fordice* "largely rested its finding of a state protected right to abortion to that federal constitutional right found by the *Roe* court to flow from the Ninth Amendment," and the court made "inadequate attempts … to define alternate bases for finding the existence of state constitutional protection for abortion."[xvii] Judge Halford then concluded that "[s]ince *Roe* and *Casey* are no longer the law of the land, reliance upon *Fordice* will almost certainly not be well-founded when pursuing this case in the Supreme Court. … [I]t is more than doubtful that the Mississippi Supreme Court will continue to uphold *Fordice.*[xviii]

Judge Halford also stated that granting an injunction against Mississippi's bans would "clearly harm the state and its citizens." In addition to stating that enjoining these laws would deny "the public interest in the enforcement of its laws," she listed legitimate state interests in restricting abortion that were noted by the U.S. Supreme Court in *Dobbs*:

"respect for and preservation of prenatal life at all stages of development," "the protection of maternal health and safety," "the elimination of particularly gruesome or barbaric medical procedure," "the preservation of the integrity of the medical profession," "the mitigation of fetal pain," and "the prevention of discrimination on the basis of race, sex, or disability."[xix]

As in Iowa, this case will likely continue and there is no guarantee that the Mississippi Supreme Court will share Judge Halford's reasoning. However, Mississippi can begin enforcing its trigger statute, and Judge Halford's opinion provides ample reason to hope that the state's Supreme Court will agree that the right to regulate abortion belongs with the people's elected representatives.

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[i] 2022 U.S. LEXIS 3057, 19-1392 (2022).
[ii] *Planned Parenthood of the Heartland v. Reynolds ex re. State*, 915 N.W.2d 206, 237 (Iowa 2018). In 2021, Iowa's legislature proposed a state constitutional amendment providing that "the people of the State of Iowa declare that this Constitution does not recognize, grant, or secure a right to abortion or require the public funding of abortion." However, 2024 is the earliest that this amendment can appear on the ballot for approval by Iowa voters. A HJR5, 2021-2022, 89th General Assembly.
[iii] *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 650-54 (Miss. 1998).
[iv] Alaska, Florida, Kansas, Minnesota, and Montana—states that are (or may be) inclined to enact strong abortion bans—are also encumbered by state supreme court decisions creating abortion rights. Each of these states may need a state constitutional amendment either recognizing the constitutional rights of unborn children or providing that abortion is not a constitutional right. In recent years, Tennessee (2014) and West Virginia (2018) enacted state constitutional amendments to overturn state supreme court decisions finding abortion rights or the right to abortion funding in their state constitutions. In August 2022, a proposed amendment to Kansas's constitution providing that there is not a state constitutional right to abortion will be on the ballot.
[v] 2022 Iowa Sup. LEXIS 80, No. 21-0856 at 7-8 (Iowa 2022), emphasis added.
[vi] *Id.* at 58. These "substantive constitutional guarantees" do not mention abortion.
[vii] *Id.* at 71.
[viii] *Id.* at 64.
[ix] *Id.*
[x] *Id.*
[xi] *Id.* at 68-69.
[xii] *Id.* at 65-66.
[xiii] *See Id.* at 78: "Lastly, the United States Supreme Court is expected to decide an important abortion case this term. … We expect the opinions in that case will impart a great deal of wisdom we do not have today. Although we take pride in our independent interpretation of the Iowa Constitution, often our independent interpretations draw on and contain exhaustive discussions of both majority and dissenting opinions of the United States Supreme Court. We do not prejudge the position our court will take. We agree with the *PPH II* majority that '[a]utonomy and dominion over one's body go to the very heart of what it means to be free.' 915 N.W.2d at 237 (majority opinion). We also agree that 'being a parent is a life-altering obligation that falls unevenly on women in our society.' *Id.* at 249 (Mansfield, J., dissenting). Yet, we must disapprove of *PPH II*'s legal formulation that insufficiently recognizes that

future human lives are at stake—and we must disagree with the views of today's dissent that the State has no legitimate interest in this area."

[xiv] https://governor.iowa.gov/press-release/gov-reynolds-and-legislative-leaders-announce-legal-action-to-protect-life%C2%A0.

[xv] *Jackson Women's Health Organization v. Dobbs*, Memorandum Opinion and Order Denying Plaintiffs' Motion for Preliminary Injunctive Relief, Cause No. 25CH1:22-CV-00739 (July 5, 2022).

[xvi] *Id*. at 5.

[xvii] *Id.* at 6.

[xviii] *Id.*

[xix] *Id.* at 7.