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Georgia & North Dakota: More State Judges Question the Constitutionality of Abortion Bans

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State courts continue to debate whether a state's constitution recognizes a right to "liberty of privacy" or personal autonomy that would encompass the right to make personal health care decisions, including abortion.

In the post-*Dobbs* era, state supreme courts have been divided over whether state constitutions offer protections for abortion. Supreme courts in Florida and Iowa have rejected state constitutional protections for abortions, while those in Oklahoma and Montana have found or upheld certain constitutional protections for abortion. Recently, district court judges in Georgia and North Dakota have issued injunctions against their respective state's abortion bans, finding that each state's constitution protects a right to abortion.

On September 14, 2024, a district court judge in North Dakota enjoined North Dakota's total prohibition on abortion, and on September 30, 2024, a superior court judge in Fulton County, Georgia, issued an injunction blocking the state's six-week abortion ban. While the fate of the North Dakota injunction remains pending, on October 7, the Georgia Supreme Court stayed the lower court's injunction, allowing Georgia's six-week ban on abortion to once again take effect. One Georgia Supreme Court justice—Justice John J. Ellington—dissented in part from the decision, opining that "[t]he 'status quo' that should be maintained is the state of the law before the challenged law took effect."

Georgia: *SisterSong Women of Color Reproductive Justice Collective v. State of Georgia*

The plaintiffs in *SisterSong Women of Color Reproductive Justice Collective v. State of Georgia* challenged the state's Living Infants Fairness and Equality Act (also known as "H.B. 481" or the "LIFE Act") on federal and later state constitutional grounds. The six-week abortion ban, enacted in 2019, was blocked in January 2020 while *Roe v. Wade* was still good law—but was allowed to go forward by the courts in the wake of the U.S. Supreme Court's June 2022 opinion in *Dobbs v. Jackson Women's Health Organization,* overruling *Roe v. Wade* and eliminating the federal constitutional right to abortion.

The *SisterSong* plaintiffs, "a coalition of Georgia-based obstetrician-gynecologists[,] reproductive

health centers, and membership groups committed to reproductive freedom and justice," filed suit on July 26, 2022, and found success in the superior court later that year. In November 2022, the district court granted in part a motion for partial summary judgment—concluding that the ban ran afoul of the U.S. constitutional right to abortion afforded by *Roe v. Wade* when it was passed. A subsequent post-*Dobbs* decision in October 2023 by the Georgia Supreme Court, however, left the ban in place.

In the latest round, the *SisterSong* plaintiffs once again challenged Section 4 of the LIFE Act, criminalizing abortions after the detection of a fetal heartbeat, typically around six weeks into a pregnancy, and Section 11, requiring any doctor performing an abortion after detecting a fetal heartbeat to justify the procedure to the state Department of Public Health. (Section 10, requiring doctors to determine the presence of any fetal heartbeat before performing an abortion, was determined to be constitutional in the November 2022 order).

In its September 30 remand decision, the district court determined that Sections 4 and 11 of the LIFE Act—as well as O.G.C.A. §16-12-141(f), as amended by the LIFE Act—violated the state constitutional rights to liberty, privacy, and equal protection of the patients and members of the collective. Regarding the right to liberty, the judge in the case, Robert C.I. McBurney, held that since the statute "infringes upon a woman's fundamental rights to make her own healthcare choices and to decide what happens to her body, with her body, and in her body," it must be narrowly tailored to serve a compelling state interest. The Georgia law failed that test, as the prohibitions take effect before most women even know that they are pregnant. Under the prior law, the use of viability as a determining factor meant that the fetus was capable of surviving outside of the womb—balancing a woman's right to "liberty of privacy" and the fetus's right to life.

Regarding the right to equal protection, the plaintiffs' first claim asserted that women who elect to proceed with a pregnancy do not have health care decisions made by the state—whereas those who seek to terminate before viability face unwarranted interference. While the judge found that argument to be simply reframing the "liberty of privacy" argument, he found merit in the plaintiffs' second claim that women with mental health emergencies are treated differently than women with physical health emergencies under the statute.

Judge McBurney found the ban's rape or incest exception—allowing termination at 20 weeks or less if an official police report is filed alleging rape or incest—to be linked to the Section 4 analysis and dependent on whether Section 4 is ultimately held to be constitutional or not.

Another portion of the statute that the abortion ban alters—§ 16-12-141(f), requiring that women's health records be available to the district attorney of the judicial circuit where the abortion takes place—unconstitutionally violates patients' right to privacy by empowering prosecutors to obtain personal medical information without sufficient process, Judge McBurney held.

The Georgia Supreme Court issued an order staying Judge McBurney's injunction, which allowed the ban to once again take effect in Georgia. However, the Georgia Supreme Court left in place the district court injunction with respect to O.C.G.A. § 16-12-141(f)—the portion of Georgia's abortion ban that would require health records to be available to the district attorney in the jurisdiction in which an abortion occurs.

North Dakota: *Access Independent Health Services, Inc., d/b/a Red River Women's Clinic v. Wrigley*

In North Dakota, a district court enjoined the state's amended abortion ban, which permitted abortion

only in cases of rape or incest in the first six weeks of pregnancy, and later only in specific medical emergencies. District Court Judge Bruce Romanick denied the state attorney general's motion for summary judgment—finding N.D.C.C. ch. 12.1-19.1 unconstitutionally void for vagueness. The statute declares the performance of an abortion a Class C felony, except when necessary, based on reasonable medical judgment to prevent death or a serious health risk.

"As currently written, a North Dakota physician may provide an abortion with the subjective intent to prevent death or a serious health risk, yet still be held liable if, after the fact, other physicians deem that the abortion was not necessary or was not a reasonable medical judgment," Judge Romanick wrote, adding that the North Dakota medical exception "does not allow a physician to know against which standard his [*sic*] conduct will be tested and his liability determined." The exception for rape or abuse is also vague, the judge determined.

Judge Romanick further concluded that pregnant women in North Dakota have a fundamental right to choose abortion before viability exists, under rights guaranteed by the state constitution. "[I]mplicit in the right to personal autonomy—liberty—and implicit in the right to happiness—is a woman's right and responsibility to decide what her pregnancy demands of her in the context of her life and in the context of her health," the judge wrote. "Prior to viability, a woman must retain the ultimate control over her own destiny, her own body, and ultimately, the path of her life. . . . The Court finds that such a choice, at least pre-viability, must belong to the individual woman and not to the government. The inalienable rights to life, liberty, and happiness demand it."

A hearing before Judge Romanick is set for October 10 on the state's motion to keep the ban in place until the North Dakota Supreme Court issues a final decision on the matter.

Takeaways

The *Dobbs* decision continues to create uncertainty for medical providers in states where abortion is banned or severely restricted. In Georgia, at least two women have died after being unable to access abortions. The Associated Press reports that while North Dakota has no abortion clinics, invalidating that ban would affect doctors in hospitals when a patient faces a medical emergency.

State supreme court decisions on the constitutionality of abortion restrictions could reach beyond abortion and impact state constitutional protections for health care decisions in general. Cases involving abortion present state supreme court justices with the ability to evaluate the limits of constitutional protections for personal autonomy, bodily integrity, and privacy. While these cases tend to limit the evaluation of constitutional rights to the specific instance of abortion, the rationale these state supreme courts provide could be applied in other contexts.

For example, in evaluating the Florida Constitution's right to privacy, the Florida Supreme Court characterized the historical motivation to pass the Florida Constitution's privacy amendment as a concern for "informational privacy" and protection from "government surveillance" as opposed to a concern for interference in medical decision-making. *See Planned Parenthood of S.W. and Central Fla. et al. v. Florida*, 384 So.3d 67, 83 (Fla. Apr. 1, 2024). Further, the Florida Supreme Court acknowledged in dicta that while "[t]he decision to have an abortion [is] . . . made in solitude . . . the procedure itself include[s] medical intervention and require[s] both the presence and intrusion of others," and that a "transaction resulting in an operation such as [abortion] is not 'private' in the ordinary usage of that word." *Id*. at 78, *quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 792 (1986) (White, J., dissenting).

Under this logic, perhaps medical procedures such as *in-vitro* fertilization, a procedure to create, store, and implant human embryos into a human body, would not qualify as sufficiently "private" to be covered by a state constitutional protection if a state legislature passed a restriction on the procedure. In the Georgia case, Judge McBurney seemed to draw a similar conclusion, writing that "[i]t is not for a legislator, a judge, or a Commander from the Handmaid's Tale to tell these women what to do with their bodies during this period when the fetus cannot survive outside the womb any more so than society could—or should—force them to serve as a human tissue bank or to give up a kidney for the benefit of another."

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