

ML Strategies Outlook: Federal Action Post-Dobbs Decision

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On June 24, 2022, the Supreme Court of the United States ruled on *Dobbs v. Jackson Women's Health Organization*. This ruling overturned *Roe v. Wade*, which held that women had a fundamental right to an abortion. Since the *Dobbs* decision, states have had the authority to implement abortion policies without fear of constitutional challenge. Recent insight posts from Mintz have addressed various issues that arise from the *Dobbs* decision: refer to commentary on [employer-sponsored group health plans, protecting health information](#), and [guidance from government agencies](#).

As Congress pushes legislation in preparation for the August recess, ensuring abortion access remains a legislative priority for Democrats. Here's our latest update on current and expected federal and Massachusetts action on abortion access and care since the *Dobbs* decision.

Letters to Congress and the Biden Administration

In the wake of the *Dobbs* decision, Speaker of the House Nancy Pelosi sent a [Dear Colleague letter](#) confirming Democratic leadership's commitment to passing legislation that will protect women's reproductive rights. Pelosi wrote in support of protecting reproductive health data, affirming the right to travel across state lines for abortion care, and passing the Women's Health Protection Act ([H.R. 8296](#)).

Furthermore, Democrats sent letters to the Biden Administration urging action on protecting the right to abortion nationwide.

1. Congresswoman Ayanna Pressley (MA-07), Chair of the Pro-Choice Caucus' Abortion Rights and Access Task Force, led a group of Black Congresswomen in a letter to President Biden urging him to declare a public health emergency in response to the *Dobbs* decision, and as a result, swift action from states to ban abortion.
2. A group of 34 Senate Democrats [sent a letter](#) to President Biden urging him to use the 'full force' of the federal government to protect abortion access.
3. More than 80 House Democrats [sent a letter](#) to President Biden to urge him to invoke a national public health emergency declaration under the *Stafford Act* to help ensure access to medication abortion.

Biden Administration

President Biden has made it clear that the only way to secure women's rights to abortion is to codify *Roe v. Wade* – and that can solely be achieved through Congress. Although the President has limited options, he has announced a series of action to protect women across the country.

1. President Biden signed an [executive order](#) on Friday, July 8, that requires the Department of Health and Human Services (HHS) to submit a report on efforts to safeguard birth control pills, abortion pills, and emergency medical care for pregnant women.
2. On Monday, July 11, the Biden administration released [updated guidance](#) on the Emergency Medical Treatment and Active Labor Act that would mandate providers to perform abortions in emergency or life-threatening situations, even in states that have enacted abortion bans. Any provider found to not adhere to this guidance could face fines or removal from the Medicare program.
3. The Department of Justice (DOJ) and White House lawyers are assembling a group of attorneys to provide legal services to people seeking abortions at no cost. The DOJ also [announced](#) the establishment of a Reproductive Rights Task Force to identify ways to protect access to reproductive care.

These actions are not without pushback from states. Texas became the [first state to sue](#) the Biden administration over its abortion guidance, specifically claiming that the guidance telling doctors to perform

abortion during emergencies forces them to commit crimes and risk their licensure.

The Biden administration continues to take a cautious approach to determine which initiatives to protect access to abortion care cannot be struck down by the Supreme Court. The Administration is currently considering actions flagged by Democratic liberals??such as opening abortion clinics on federal land and issuing a public health emergency declaration.

Congressional Hearings

Chairs of several Congressional committees raced to hold hearings on the implications of the Dobbs decision as they went back into session for the first time since the *Dobbs* decision was announced. Democrats used the hearings to vocally support codifying abortion rights and access into law, urging for support of the Women's Health Protection Act ([H.R. 8296](#)) —a bill that would codify *Roe v. Wade*—and the Ensuring Access to Abortion Act ([H.R. 8297](#))—legislation to protect the right of people to travel nationwide to receive abortion care. Republicans focused on the maternal mortality crisis and promoting crisis pregnancy centers. Below you'll find a summary of the hearings:

1. Senate Judiciary Committee

- Title: "A Post-Roe America: The Legal Consequences of the Dobbs Decision."
- Panelists: The Honorable Juliana Stratton, Lieutenant Governor of Illinois, Khaira M. Bridges, Professor of Law at UC Berkeley School of Law, Dr. Collen P. McNicholas, Chief Medical Officer at Planned Parenthood of the St. Louis Region of South West Missouri, Denise Harle, Senior Counsel and Director of the Center For Life Alliance Defending Freedom, Heidi Matzke, Executive Director of Alternatives Pregnancy Center.
- Summary: Democratic witnesses collectively urged Congress to pass the Women's Health Protection Act (WHPA), while the Republican witnesses denounced the legislation.

2. Senate Health, Education, Labor, and Pensions Committee

- Title: "Reproductive Care in a Post-Roe America: Barriers, Challenges, and Threats to Women's Health."
- Panelists: Dr. Kristyn Brandi, Board Chair, Physicians for Reproductive Health, Samie Detzer, Planned Parenthood Patient Advocate, Planned Parenthood Federation of America, Dr. Jamila Taylor, Director of Health Care Reform and Senior Fellow, The Century Foundation, Brandi Swindell, Founder and CEO, Stanton Healthcare.
- Summary: Witnesses spoke about the growing maternal mortality crisis and the devastating impact abortion bans will have on people of color and low-income communities. Dr. Taylor pleaded with the Committee to pass the Women's Health Protection Act ([H.R. 8296](#)) along with the Equal Access to Abortion Coverage in Health Insurance Act (S. 1021) and the Black Maternal Health Momnibus Act ([H.R. 959](#)).

3. House Oversight and Reform Committee

- Title: "The Impact of the Supreme Court's Dobbs Decision on Abortion Rights and Access across the United States."
- Panelists: The Honorable Mallory McMorrow, Michigan State Senator, The Honorable Renitta Shannon, Member, Georgia State House of Representatives, Fatima Gross Graves, President and CEO, National Women's Law Center, Michele Bratcher Goodwin, Chancellor's Professor of Law, University of California, Irvine, Sarah Lopez, Abortion Storyteller, We Testify, and Youth Program Manager, Jane's Due Process, Erin Morrow Hawley, Senior Counsel, Alliance Defending Freedom.
- Summary: Democratic panelists and Committee members spoke at length about the harm of abortion bans, especially on low-income communities and people of color, and discussed the harmful implications of these bans during medical emergencies. Republicans argued that Democrats are ignoring violence against pro-life groups and are attempting to delegitimize the Supreme Court.

4. House Judiciary Committee

- Title: "What's Next: The Threat to Individual Freedoms in a Post-Roe World."
- Panelists: Melissa Murray, Frederick I. and Grace Stokes Professor of Law, Faculty Director, Birnbaum Women's Leadership Network, New York University School of Law, Sarah Warbelow, Legal Director, Human Rights Campaign, Catherine Glenn Foster, President and CEO Americans United for Life, Jim Obergefell, Plaintiff in *Obergefell v. Hodges*.
- Summary: Democratic committee members and witnesses warned of the potential consequences the Dobbs decision will have on other rights, including same-sex marriage and access to contraceptives. Democrats urged their colleagues to support the passage of the WHPA, while Republicans voiced opposition to the WHPA, calling it "abortion on demand until birth."

5. House Committee on Energy & Commerce, Subcommittee on Oversight and Reform

- Title: "Roe Reversal: The Impacts of Taking Away the Constitutional Right to an Abortion"
- Panelists: Renee Bracey Sherman, Founder and Executive Director, We Testify, Leah M. Litman, Assistant Professor of Law University of Michigan Law School, Dr. Paulina Guerrero, National Programs Manager, All-Options, Dr. Nisha Verma, Fellow, Physicians for Reproductive Health, Dr. Jack Resneck, President, American Medical Association, Dr. Christina Francis, CEO-Elect, American Association of Prolife Obstetricians and Gynecologists.

- Summary: Democratic members and panelists spoke about the dangers of decreased abortion access and abortion bans, including the potential threats to other constitutionally-assured rights. The Republican panelist and members emphasized that life begins at conception; thus, abortion always results in the death of at least one of the patients being treated.

Although Democrats used these hearings to raise abortion policies, the legislation is unlikely to become law due to the Senate filibuster. The Freedom to Travel for Healthcare Act ([S. 4504](#)) was sent to the Senate floor for consideration and was blocked by Senator James Lankford (R-OK) when Senator Catherine Cortez Masto (D-NV) requested a voice vote on the bill. Despite the Senate's failure to pass the bill in their chamber, the House passed the Ensuring Access to Abortion Act ([H.R. 8297](#)) and an updated version of the Women's Health Protection Act ([H.R. 8296](#)) on Friday.

National Defense Authorization Act

This year, Members of Congress in the lower chamber submitted a total of 1,230 amendments to be considered in the National Defense Authorization Act (NDAA). Democratic liberals are attempting to use the NDAA as a path to drive abortion protections to the House floor. Congresswomen Pramila Jayapal (D-WA) and Jackie Speier (D-CA) filed an [amendment](#) that would repeal restrictions on the use of medical institutions and funding from the Department of Defense (DOD) for abortion. Currently, abortion services at the DOD are solely provided to individuals that are experiencing high-risk pregnancy or conceived due to rape or incest. In addition, Congresswoman Maxine Waters (D-CA) proposed an [amendment](#) that would require the Consumer Financial Protection Bureau to promulgate privacy protections for financial data or reproductive health services pertaining to abortion. On the other side of the aisle, Republicans filed amendments in attempt to halt any efforts on protecting reproductive rights. Congressman Scott Franklin's (R-FL) [amendment](#) would prohibit the DOD from leasing land to organizations that provide abortion services, and Congresswoman Lauren Boebert (R-CO)'s [amendment](#) would bar the federal government from leasing federal property to abortion providers.

The House Rules Committee approved 650 out of the 1,230 amendments to be considered on the House floor. None of the abortion-related amendments passed out of the committee, as House Rules Committee Chair Jim McGovern reported that including those provisions would hamper bipartisan support on the legislation. Within days, the House passed its version of the NDAA, with 180 Democrats and 149 Republicans voting in favor of the legislation. The Senate has yet to vote on their version of the NDAA, and it does not include any provisions or amendments relating to reproductive rights.

FY23 Appropriations

Last month, the House Appropriations Committee marked up and approved the Fiscal Year 2023 Labor, Health and Human Services, Education, and Related Agencies funding bill. During the markup of this legislation, the Hyde amendment, which bars the use of federal funding for abortion services, was a major debating point for Members of Congress across the aisle. Republicans pushed for the Hyde amendment to remain in the appropriations bill since it has been incorporated for over 40 years, including the most recently passed government funding package. However, Democrats disaffirmed that argument, given the Supreme Court ruling in *Dobbs*, and rejected the amendment in a 26-31 vote. Besides the repeal of the Hyde amendment, this legislation also sets aside \$25 million for the Health Resource and Services Administration to fund grants to health centers so they can train medical practitioners on providing enhanced contraceptive services to patients. The House Appropriations Committee also included Congresswoman Barbara Lee's amendment, which would urge the Department of Health and Human Services (HHS) to guarantee access to medication abortion.

As Members of Congress face re-election in November, they will continue to push for action on access to abortion before the August recess. We will continue to monitor and report on updates to federal abortion policy.

Massachusetts

The Commonwealth of Massachusetts immediately and decisively reacted to the *Dobbs* decision by strengthening reproductive rights beyond the ability to access abortion care, which was signed into law in 2020. The day the decision was released, Governor Baker issued an Executive Order and just days later the Legislature quickly acted on a bill codifying that order and more, currently before conference committee.

The Executive Order was immediately effective and prohibits any executive branch employee from providing information to another state investigating anyone for receiving otherwise legal reproductive health services within the Commonwealth. The Order goes on to protect the licenses of any professional providing services that are legal in the Commonwealth, and provides that the Governor shall decline any request for interstate extradition related to criminal violations of other state's reproductive health laws.

Days later, the House acted on a bill that would make the Executive Order permanent, and goes on to codify gender-affirming health care, ease access to emergency contraception, and cover abortions without deductibles. Two weeks later, the Senate unanimously adopted a similar bill; they had previously adopted language protecting health care practitioner's licenses, preventing extradition to another state for engaging in legally protected health care in Massachusetts, and preventing judges from issuing a summons regarding legally protected health care activity for another state in their budget after the leaked draft *Dobbs* opinion. These bills were sent to a conference committee on July 14th which will likely reach resolution this week as formal sessions wrap up for the 2021-2022 session. One thing is clear, Massachusetts is working collaboratively to unequivocally safeguard the rights of those seeking

healthcare in a rapidly changing national landscape.

Authors



Pamela Mejia, Senior Manager of Government Relations

Pamela Mejia advises clients on federal legislative and regulatory strategy, with a focus on health care and social policy. She helps clients build meaningful relationships with policymakers and develop strategic messaging to advance their priorities in an evolving political landscape.

Ellen Janos

Kaitlyn Sprague